

United States  
13  
Circuit Court of Appeals  
For the Ninth Circuit.

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LOUIS ONEAL,

Appellant,

vs.

SAN JOSE CANNING COMPANY, a Corpora-  
tion,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Northern District of California,  
Southern Division.

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FILED

MAR 22 1929

PAUL P. O'BRIEN,

CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Street, San Francisco,

A. SCHAPP, Esq., Hobart Building, San Francisco,  
Attorneys for Defendant.

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In the United States District Court for the South-  
ern Division of the Northern District of Cali-  
fornia.

EQUITY—No. 1307.

LOUIS ONEAL,

Plaintiff,

vs.

SAN JOSE CANNING COMPANY, a Corpora-  
tion,

Defendant.

AMENDED BILL OF COMPLAINT—INJUNCTION, INFRINGEMENT AND ACCOUNTING.

To the Honorable, the United States District Court of the Southern Division of the Northern District of California:

Now comes, Louis Oneal, hereinafter called plaintiff, and files this, his amended bill of complaint, as of course, and for his cause of action against the San Jose Canning Company, a corporation, hereinafter called defendant, respectfully shows:

I.

That for several years last past, the defendant has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the county of Santa Clara, State of California.

II.

That on and prior to January 30, 1917, one Anthony Greco, was engaged in devising, inventing and perfecting a new and useful improvement in the device and method of canning string beans and other vegetables, which improvement consisted of a mold for packing full length string beans, asparagus style, and said Anthony Greco was the original, first and sole inventor of said new and useful device and method and the same was not known or used by others in this country and not patented or described in this or any foreign coun-



try, before said Anthony Greco's invention or discovery thereof, and not in public use or on sale prior to his application for a patent thereof.

### III.

That on or about May 1, 1917, the said Anthony Greco duly made application to the Commissioner of Patents of the United States for letters patent to said device and invention, and thereafter, to wit: on August 7, 1917, letters patent were duly and regularly issued to said Anthony Greco, numbered 1,235,680, for and to said device and invention, and said letters patent have never been revoked or set aside, and are now in full force and effect, as by a certified copy of said letters patent, in court to be produced, will more fully appear.

### IV.

That on or about the 12th day of May, 1923, by an instrument in writing, the said Anthony Greco, duly assigned, transferred and set over unto the plaintiff herein all of his right, title and interest in and to said letters patent and the invention thereby secured, as by the said assignment, in court to be produced, will more fully and at large appear.

That by virtue of the assignment aforesaid, plaintiff became and now is the sole and exclusive owner of said letters patent and of the invention and of all rights secured by said letters patent since the date thereof, and is entitled to be protected in the enjoyment of the same.

### V.

That during the year 1922, the defendant recog-

nized the rights of said Anthony Greco in and to said patent and method and made use of said patent and method of canning string beans in its business under a license granted it by said Anthony Greco.

That said license expired after the canning season of the year 1922.

#### VI.

That during the year 1923 the defendant negotiated with plaintiff for a license under said patent so that it would be able to use said device and method in the canning of string beans during the canning season of the year 1923, but said negotiations were never brought to a conclusion and no license under said patent was issued to defendant for the year 1923.

That said defendant well knowing the rights of plaintiff in and to said device and method and against the will of plaintiff, and in violation of plaintiff's rights, did during the year 1923 make use of said device and method of canning string beans and did can a large quantity of string beans in accordance with said method and by the use of said device, the exact quantity of string beans so canned being unknown to plaintiff.

#### VII.

That the defendant well knowing the rights of plaintiff in and to said device and method and against the will of plaintiff, and in violation of plaintiff's rights, has been and is now infringing said letters patent within the Southern Division of the Northern District of California by soliciting orders for the sale of string beans canned in accordance with



the method and by the use of the device covered by said letters patent.

That the defendant is threatening to and unless restrained from so doing will proceed at once to can string beans in accordance with said method and by use of said device.

That all of said acts and doings are and will be contrary to equity and good conscience, and tend to the manifest injury of plaintiff.

#### VIII.

That plaintiff has notified defendant to desist from the use of said device and invention and from the infringement of said patent rights of plaintiff therein and thereunder but notwithstanding such notice the defendant has utterly refused and neglected to discontinue the use of said device and method, all to the great and irreparable damage, loss and injury of this plaintiff.

#### IX.

That the defendant is financially unable to respond in damages should any be awarded on account of said infringement.

#### X.

That the profits realized by defendant during the canning season of 1923 by reason of its use of said device and method, amount, as plaintiff is informed and believes, and, therefore, alleges, to approximately Thirty Thousand (30,000) Dollars.

That the profits which will be realized by defendant during the canning season of 1924 by reason of its use of said device and method will, as plaintiff is

informed and believes, and therefore alleges, amount to approximately Forty Thousand (40,000) Dollars.

## XI.

That unless a temporary restraining order is granted herein, the string beans canned by the defendant in accordance with said device and method will be distributed throughout the State of California to a great number of wholesalers, dealers, jobbers and retail dealers; that in order to protect his rights plaintiff will be compelled to bring actions against such persons, resulting in vast litigation, endless confusion among the trade, and a tendency to bring the said device and method into disrepute among those persons who are most apt to make use of said device and method and the produce thereof.

WHEREFORE plaintiff prays that pending the hearing and determination of this action, the defendant be enjoined from using said device and invention and that upon the trial thereof, such injunction be made permanent; that defendant be immediately and temporarily enjoined from such use, pending the hearing of plaintiff's application for a preliminary injunction herein; that defendant be compelled to account for any profits realized as a result of said infringement; and that plaintiff have such other and further relief as may be meet and equitable in the premises and recover his costs from the defendant herein.

PRESTON & DUNCAN,  
CARLOS P. GRIFFIN,  
Attorneys for Plaintiff.

State of California,  
County of Santa Clara,—ss

Louis Oneal, being first duly sworn, deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read the same and knows the contents thereof and that same is true of his own knowledge except as to the matters therein stated on information or belief and as to those matters he believes it to be true.

LOUIS ONEAL.

Subscribed and sworn to before me this 11th day of September, 1924.

J. V. ENDERT,  
Notary Public in and for the County of Santa Clara, State of California.

Receipt of a copy of the within amended bill of complaint is admitted this 12th day of September, 1924.

A. SCHAPP,  
Attorney for Defendant.

[Endorsed]: Filed September 13, 1924.

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(Title of Court and Cause.)

AMENDED ANSWER TO BILL OF COMPLAINT.

The defendant, San Jose Canning Company, for

answer to the bill of complaint filed in the above-entitled cause, says as stated herein :

### I.

The defendant, San Jose Canning Company, admits that it is a corporation organized and existing under the laws of the State of California and that it has its principal place of business in the county of Santa Clara as set forth in Paragraph I of the bill.

### II.

The defendant admits the issuance to one Anthony Greco of United States letters patent in suit, No. 1,235,680 as set forth in Paragraph 3 of the bill, but, on information and belief, denies that any rights or privileges were secured by said letters patent No. 1,235,680, in and to the improvement, and therefore denies that the plaintiff acquired any rights or privileges by virtue of the issuance of the letters patent and assignment thereof, if any was made, and defendant, on information and belief, says that the said letters patent were surreptitiously and unjustly obtained for that which was in fact invented by others and suggested to said Anthony Greco by what had been disclosed to him by others and by what he had seen in common use and generally on sale, and defendant therefore denies the allegations contained in Paragraph 2 of the bill.

### III.

This defendant is not informed, save by the bill, and therefore does not know whether said Anthony Greco made an assignment of said letters patent to



this plaintiff and that this plaintiff is now the owner and holder of the patent in suit, and leaves the plaintiff to strict proof thereof.

#### IV.

As to Paragraph 5 of the bill, this defendant admits that during the year 1922, he paid to one Anthony Greco the sum of \$500.00 for the purpose of not litigating a patent suit in connection with the patent now in suit, and further says that this sum was paid said Anthony Greco because the latter threatened suit against this defendant during defendant's canning season, and that it was understood between said Anthony Greco and the defendant that the latter would subsequently work under a patent of its own and that the aforesaid payment was made without any acquiescence in the validity of the patent in suit or admission of infringement thereof.

#### V.

As to Paragraph 6 of the bill, defendant denies that during the year of 1923 it negotiated with this plaintiff for a license under said patent but alleges that it was approached by agents of the plaintiff to pay another sum of \$500.00 for the year of 1923, but that it steadfastly refused to pay said sum or admit the validity of said patent.

#### VI.

As to paragraph 7 of the bill, defendant positively denies that it ever used the method or device of the patent in suit, or that it ever violated any rights or privileges of this plaintiff, and says that the string beans packed by it were packed in accordance with

answer to the bill of complaint filed in the above-entitled cause, says as stated herein :

### I.

The defendant, San Jose Canning Company, admits that it is a corporation organized and existing under the laws of the State of California and that it has its principal place of business in the county of Santa Clara as set forth in Paragraph I of the bill.

### II.

The defendant admits the issuance to one Anthony Greco of United States letters patent in suit, No. 1,235,680 as set forth in Paragraph 3 of the bill, but, on information and belief, denies that any rights or privileges were secured by said letters patent No. 1,235,680, in and to the improvement, and therefore denies that the plaintiff acquired any rights or privileges by virtue of the issuance of the letters patent and assignment thereof, if any was made, and defendant, on information and belief, says that the said letters patent were surreptitiously and unjustly obtained for that which was in fact invented by others and suggested to said Anthony Greco by what had been disclosed to him by others and by what he had seen in common use and generally on sale, and defendant therefore denies the allegations contained in Paragraph 2 of the bill.

### III.

This defendant is not informed, save by the bill, and therefore does not know whether said Anthony Greco made an assignment of said letters patent to

this plaintiff and that this plaintiff is now the owner and holder of the patent in suit, and leaves the plaintiff to strict proof thereof.

#### IV.

As to Paragraph 5 of the bill, this defendant admits that during the year 1922, he paid to one Anthony Greco the sum of \$500.00 for the purpose of not litigating a patent suit in connection with the patent now in suit, and further says that this sum was paid said Anthony Greco because the latter threatened suit against this defendant during defendant's canning season, and that it was understood between said Anthony Greco and the defendant that the latter would subsequently work under a patent of its own and that the aforesaid payment was made without any acquiescence in the validity of the patent in suit or admission of infringement thereof.

#### V.

As to Paragraph 6 of the bill, defendant denies that during the year of 1923 it negotiated with this plaintiff for a license under said patent but alleges that it was approached by agents of the plaintiff to pay another sum of \$500.00 for the year of 1923, but that it steadfastly refused to pay said sum or admit the validity of said patent.

#### VI.

As to paragraph 7 of the bill, defendant positively denies that it ever used the method or device of the patent in suit, or that it ever violated any rights or privileges of this plaintiff, and says that the string beans packed by it were packed in accordance with



a novel and patentable invention of one Ignatius Rancadore of San Jose, California, secretary and general manager of the defendant, San Jose Canning Company, and patented in the United States, August 14, 1923, United States letters patent No. 1,464,829.

## VII.

Defendant, except for the notice afforded by the bill, denies the allegations contained in Paragraph 8 of the bill and says that plaintiff has acquiesced in defendant's use of the device herein complained of, and further says that the plaintiff, well knowing the acts of this defendant, is guilty of laches, and in view of the acts of the parties referred to in Paragraph 4 of this answer, plaintiff is estopped from denying the rights and privileges afforded this defendant through issuance of said United States letters patent to said Ignatius Rancadore and by virtue of the payment of said \$500.00 by said defendant to said Anthony Greco in the year 1922 and says that if any assignment of the letters patent in suit was made to this plaintiff, the latter took title to said patent subject to the terms and conditions of the license between this defendant and said Anthony Greco.

## VIII.

Defendant denies the allegations contained in Paragraph 9 and 10 of the bill.

## IX.

As to plaintiff's amended bill, defendant denies the allegations contained in Paragraph 10 thereof and says that any possible damage done to this



plaintiff could not exceed the customary royalties paid by others to this plaintiff, and in this connection, defendant alleges, on information and belief, that the plaintiff has granted licenses to various parties to operate under the said patent for nominal sums.

X.

Defendant denies the allegations contained in Paragraph 11 of the amended bill.

XI.

That, on information and belief, the said Anthony Greco was not the original and first inventor or discoverer of the alleged improvement or of any substantial of material part thereof, and that the alleged improvement and all the substantial and material parts thereof, were, long prior to any invention by the said Anthony Greco, known to and used by the following persons at the places hereinafter named and whose last known addresses are hereinafter stated, namely:

Julius Weshnitzer, 1st & Williams Streets, San Jose, California.

Sacramento Canning Company, Sacramento, California.

K. Koblick, 1010 Fillmore Street, San Francisco, California.

Peter Wilhelm, 49 Pine Street, San Francisco, California.

H. Shaw, 3804 Central Avenue, Los Angeles, California.

Gluckman & Strauch (formerly Gluckman & Son), 41 Greene Street, New York, N. Y.

A. B. Newman, 288 East Houston Street, New York,  
N. Y.

American Key Can Company, of Chicago, Illinois.

Isleton Canning Company, Isleton, California.

United States Department of Agriculture, F. C.  
Blanck (Chemist in Charge Food Control Lab-  
oratory).

Pacific Coast Canning Company, Oakland, Cali-  
fornia.

H. C. Perry, Loomis, Placer County, California.

O. H. Perry, Manlius, New York.

M. E. Snook, c/o O. H. Perry & Son, Manlius, New  
York.

Max Gluckman, 41 Greene Street, New York, N. Y.,

Gluckman, Jr., 41 Greene Street, New York, N. Y.

Toni Cerruti, California Packing Corporation,  
Beach & Hyde Streets, San Francisco, Cali-  
fornia.

Dominick Cerruti, California Packing Corporation,  
San Jose, California.

Baker, Hamilton & Pacific Company, 700-7th  
Street, San Francisco, California.

E. F. Curtis, c/o Baker, Hamilton & Pacific Com-  
pany, 700-7th Street, San Francisco, California.

George W. Prising, 63 Clay Street, San Francisco,  
California.

and others, whose names and places of residence  
and use this defendant craves leave to furnish here-  
after and to incorporate in its answer.

## XII.

That, on information and belief, said Anthony  
Greco was not the original and first inventor of the

alleged improvement or of any substantial or material part thereof; but, on the contrary, the alleged improvement and the substantial and material parts thereof was and were, long prior to the date of the alleged invention by said Anthony Greco, set forth in the following letters patents, namely, United States letters patents:

No. 166,667, granted August 10, 1875, to F. Watkins.

No. 266,810, granted October 31, 1882, to E. W. Grove.

No. 326,826, granted September 22, 1885, to C. W. Young.

No. 607,519, granted July 19, 1898, to O. I. Millar.

No. 744,129, granted November 17, 1903, to W. S. Thomas.

No. 932,796, granted August 31, 1909, to C. B. Manbeck.

No. 1,206,877, granted December 5, 1916, to F. P. McCall.

No. 990,479, granted April 25, 1911, to J. Edwards.

No. 999,018, granted July 25, 1911, to J. W. Duncan.

No. 1,058,579, granted April 8, 1913, to G. W. Gwinn.

No. 1,099,791, granted June 9, 1914, to L. Fischer.

No. 1,183,290, granted May 16, 1916, to W. Frost.

No. 1,208,175, granted December 12, 1916, to L. Lipman.

No. 659,337, granted October 9, 1900, to A. W. Brown.

No. 678,110, granted July 9, 1901, to H. H. Spelman.

No. 798,194, granted August 29, 1905, to E. P. Lawton.

### XIII.

That, on information and belief, said letters patent No. 1,235,680, do not disclose or show any invention whatsoever in view of the state of the art in the Method of Canning and Packing articles, and particularly methods designed to meet every requirement of the alleged invention of said Anthony Greco, which existed at and long prior to the time that the said Anthony Greco made the alleged invention set forth in said letters patent and that in view of the state of the art, said alleged improvement was not patentable, and involved, if anything, mere mechanical skill, and defendant therefore avers, upon information and belief, that said letters patent are void and invalid in view of the state of the art.

### XIV.

The defendant further answering denies that it has infringed upon any rights or privileges of the plaintiff in and to said letters patent in the bill of complaint mentioned, and denies that the plaintiff is and has been injured by any acts of this defendant.

WHEREFORE, the defendant, San Jose Canning Company, having fully answered to the bill of complaint, denies that the plaintiff is entitled to the relief or any part thereof demanded, or to any relief whatsoever, and prays to be hence dismissed



with their reasonable charges in this behalf most wrongfully sustained.

SAN JOSE CANNING COMPANY.

By I. RANCADORE,

Secretary.

A. SCHAPP,

Attorney for Defendant.

R. M. J. ARMSTRONG,

Of Counsel.

AS.BM.

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(Title of Court and Cause.)

AFFIDAVIT OF I. RANCADORE.

State of California,

County of \_\_\_\_\_, —ss.

I. Rancadore, being first duly sworn, deposes and says:

That he is the secretary and general manager of the San Jose Canning Company, a corporation, defendant and cross-complainant in the above-entitled suit; and that he is conversant with the facts in issue; that he has read the foregoing amended answer and that the statements therein are true of his own knowledge except as to those statements made on information and belief and that as to those statements he believes them to be true.

I. RANCADORE.

Subscribed and sworn to before me this 16th day of March, 1925.

[Notary Seal] C. B. SESSIONS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed March 23d, 1925.

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(Title of Court and Cause.)

### INTERLOCUTORY DECREE.

The above-entitled matter came on regularly for hearing before the above-entitled court on the 9th day of June, 1925. The plaintiff appeared by his attorneys, Messrs. Preston and Duncan and Mr. Carlos P. Griffin, and the defendant appeared by its attorneys, Mr. R. M. F. Armstrong and Mr. A. Schapp.

Testimony was introduced by both of the respective parties and, the testimony being closed, the matter was afterwards argued by the attorneys for the respective parties and submitted for decision, and the Court, being fully advised in the premises:

IT IS NOW, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that all of the allegations contained in the amended bill of complaint of plaintiff herein, Paragraphs numbered I, II, III, IV, VII and VIII, are true and that defendant is infringing upon the patent and patent rights of said plaintiff and that said plaintiff is entitled to an accounting of the profits made by said defendant as a result of said infringement of

said patent and patent rights for the years beginning with and including the year, 1923, down to the present time;

And Harry M. Wright, Esq., is hereby appointed as a special master to take and report the evidence in such matter, together with his findings and conclusions thereon to this court for approval.

I.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Anthony Greco named in the complaint, was the original and first inventor and discoverer of the invention, method and rights covered by the letters patent of said plaintiff numbered 1,235,680, and that said invention, methods and rights covered by the said letters patent of said plaintiff were not known to or used by any of the persons named in said defendant's answer, or any other persons nor were the same set forth in or covered by any of the letters patent mentioned in said defendant's answer but that said letters patent of said plaintiff are valid, and that said plaintiff is entitled to full protection against any infringement thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant, its agents, servants, employees and all persons acting in aid of said defendant be, and they are hereby perpetually enjoined from making use of or employing;

1. The method of canning beans which consists in arranging the beans in bunch formation within a mold, thence placing one end of the mold with

respect to the open mouth of a can, and finally causing the beans to move from within the mold into the can in bunch formation.

2. The method of canning beans which consists in arranging the beans in bunch formation within a mold, then removing the projecting end of the beans flush with the ends of the mold, thence placing one end of the mold with respect to the open mouth of a can, and finally causing the beans to move from within the mold into the can in bunch formation.

3. The method of canning vegetables of the described class which consists in placing the same in bunch formation within an inclosing mold, thence clamping the mold, thence placing one end of the mold in relation to the open mouth of a can, thence releasing the mold and causing the contents thereof to move into the can.

4. A device for use in the canning of beans and similar vegetables in bunch formation, the same comprising a mold for the reception of the vegetable to be canned, lock means for holding the mold in locked position, and an outwardly projected flange on the mold adjacent one of its ends.

5. A device for use in the canning of beans, the same comprising a mold adapted to receive and encompass the beans in bunch formation, means for holding the mold in closed position, and an outwardly projected flange on the mold adjacent one end thereof adapted to contact with the end of a can.

6. The method of canning beans or similar



elongated vegetables, the same consisting in arranging the vegetables in bunch formation within an encircling mold, closing the mold to encompass the vegetables therein, applying one end of the mold to the open end of a can, and causing the bunch of vegetables to pass endwise from within the mold into the can by application of a slight jar or tap to the mold; the foregoing being the rights secured to said plaintiff by his letters patent numbered 1235680.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said defendant and all of its agents, employees and servants be, and they are hereby enjoined from making use of the alleged invention covered by U. S. letters patent numbered 1,464,829, and said last mentioned letters patent are hereby adjudged and decreed to be an infringement of the letters patent of said plaintiff.

Done in open court this 23d day of June, 1925.

FRANK H. KERRIGAN,  
Judge.

[Endorsed]: Filed and entered June 23d, 1925.

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(Title of Court and Cause.)

ORDER      MODIFYING      INTERLOCUTORY  
DECREE.

The motion of defendant for an order modifying the terms of the interlocutory decree, heretofore entered herein to conform to the mandate of the United States Circuit Court of Appeals for the

Ninth Circuit, and for a reduction in the amount of the bond heretofore given by defendant to stay the issuance of a preliminary injunction, came on regularly to be heard at a stated term of the above-entitled court on the 5th day of June, 1926. The plaintiff appearing by Robert Duncan, Esquire, his counsel, and R. M. J. Armstrong, Esquire, of counsel for defendant, appearing on behalf of said defendant. And the motion having been argued and submitted to the Court for its decision, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that said interlocutory decree heretofore entered herein be and the same hereby is modified in accordance with mandate of said Circuit Court of Appeals to read as follows, to wit:

IT IS ORDERED, ADJUDGED AND DECREED, that Anthony Greco, named in the complaint herein, was the original and first inventor and discoverer of the device covered by claims 4 and 5 of letters patent issued to said Greco and numbered 1,235,680 and that as to said claims 4 and 5, said letters patent are valid and that plaintiff as successor in interest to said Greco is entitled to full protection against any infringement thereof. That as to claims 1, 2, 3, and 6 of said letters patent it hereby is decreed that the same are and each of them is invalid and that plaintiff has no rights therein or thereunder.

IT IS FURTHER ADJUDGED AND DECREED that defendant infringed upon the patent and patent rights of said plaintiff in the device

covered by said claims 4 and 5 of said letters patent and that plaintiff is entitled to an accounting for all damages suffered from and by reason of the infringement aforesaid beginning with and including the year 1923, down to the present time. That Harry M. Wright, Esquire, be and he hereby is appointed as a Special Master to take and report the evidence on such accounting, together with his findings and conclusions thereon to this court for approval.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That said defendant, its agents, servants, employees and all persons acting in aid of said defendants be, and they hereby are perpetually enjoined from making use of or employing:

1. A device for use in the canning of beans and similar vegetables in bunch formation, the same comprising a mold for the reception of the vegetables to be canned, lock means for holding the mold in locked position, and an outwardly projected flange on the mold adjacent to one of its ends.

2. A device for use in the canning of beans, the same comprising a mold adapted to receive and encompass the beans in bunch formation, means for holding the mold in closed position, and an outwardly projected flange on the mold adjacent one end thereof adapted to contact with the end of a can.

The foregoing being the rights secured to said plaintiff by claims 4 and 5 of letters patent numbered 1,235,680.



IT IS FURTHER ADJUDGED AND DECREED that the alleged invention covered by U. S. letters patent numbered 1,464,829 is an infringement on said letters patent numbered 1,235,680 and said defendant, its agents, servants and employees hereby are enjoined from making use of said alleged invention.

IT IS FURTHER ORDERED that upon defendant filing a bond, duly approved, in the sum of \$5,000.00, conditioned that said defendant will pay to plaintiff any judgment rendered in the above-entitled action and answer all damages and costs not to exceed said sum of \$5,000.00, the bond heretofore filed herein on the 2d day of August, 1924, in the sum of \$15,000.00, shall be cancelled and the surety thereon exonerated and said bond in the sum of \$5,000.00 shall be in lieu of said bond in the sum of \$15,000.00, and shall stay the issuance of any injunction or execution herein.

Done in open court this 22d day of June, 1926.

FRANK H. KERRIGAN,

District Judge.

[Endorsed]: Filed Jul. 16, 1926.

---

(Title of Court and Cause.)

ORDER (REQUIRING DEFENDANTS TO  
FILE ACCOUNT).

To the Defendant Above Named:

The undersigned, Harry M. Wright, having been duly and regularly appointed as Special Master to

take the evidence in the above-entitled cause and to report his findings and conclusions thereon to the above-entitled court:

NOW, THEREFORE, in pursuance thereof and under Equity Rule No. 63, you, the above-named defendant, are hereby required and ordered to make out and deliver to said Special Master at his office, Rooms 706-711 Foxcroft Building, 68 Post Street, San Francisco, California, within twenty (20) days from the date hereof, a sworn statement of account in debtor and creditor form of the profits made by you from canning string beans, packed asparagus style, during the year 1923 and each year since said time, and in this behalf you are required to state under oath:

(1) The quantity of beans packed by you asparagus style, and the amount of money paid therefor.

(2) The number of cases of such beans sold by you and to whom.

(3) The prices and amounts received therefor and the dates thereof.

(4) Cost of canning such beans, giving the items of such cost and the cost of each item.

(5) Cost of sale or marketing.

(6) Any other costs properly itemized.

(7) The profits derived by you in such business.

The above statement shall be made for each year separately, beginning with the year 1923.

You are also required to serve a copy thereof on Messrs. Preston and Duncan, attorneys for said plaintiff, at their offices, Rooms 1012-1019 Hobart

Building, 582 Market Street, San Francisco, California.

Dated this 1st day of September, A. D. 1926.

H. M. WRIGHT,  
Special Master.

Due service and receipt of a copy of the within order admitted this 1st day of September, 1926.

R. M. J. ARMSTRONG,  
Attorney for Defendant.

[Endorsed]: Filed June 8th, 1928.

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(Title of Court and Cause.)

### SWORN STATEMENT OF ACCOUNT.

It is contended that the order dated the 1st day of September, A. D. 1926, is too general and that it is not in conformity with the opinion of the Honorable Circuit Court of Appeals, dated January 18, 1926.

The contested matters in this case cannot justly, to a needful investigation by the Master, be said to embrace anything other than a true account of the profits accrued from the infringement of the aforementioned claims 4 and 5 of the patent, the only claims found to be for a valid patentable invention, and an accounting to be rendered at this or at any other time must be in respect of a narrower issue to matters in actual controversy between the parties, namely, an ascertainment of the true value to the defendant from its use of the specific device covered by said claims.

The patent in suit contained six claims, four of which are for a method of canning beans, and the remaining two claims are as follows:

4. "A device for use in canning of beans and similar vegetables in bunch formation, the same comprising a mold for the reception of the vegetable to be canned, lock means for holding the mold in locked position, and an outwardly projected flange on the mold adjacent one of its ends."

5. "A device for use in the canning of beans, the same comprising a mold adapted to receive and encompass the beans in bunch formation, and an outwardly projected flange on the mold adjacent one end thereof adapted to contact with the end of the can."

Claim 6 is as follows:

6. "The method of canning beans or similar elongated vegetables in bunch formation within an encircling mold, closing the mold to encompass the vegetables therein, applying one end of the mold to the open end of the can, causing the bunch of vegetables to pass endwise from within the mold into the can by the application of a slight jar or tap to the mold."

Claims 1, 2 and 3 of the patent in suit are somewhat similar in purpose and scope as claim 6 above referred to, and as regards these alleged method claims, the Honorable Circuit Court of Appeals said:

"But we see no merit in the claims for the method of canning beans by arranging them



in bunch formation within an encircling mold, then placing one end of the mold in contact with the open end of a can, causing the beans to move from the mold into the can. Such a process amounts to nothing more than the obviously necessary manner of operating the mechanism. (*Risden Locomotive Works vs. Medart*, 158 U. S. 68; *Vapor Car Heating Co. vs. Gold Car H. & L. Co.*, 7 F. (2d) 285.

The result of these views is that the decree of the District Court is affirmed in so far as it decrees in favor of appellee sustaining the validity of claims 4 and 5 of the patent to Greco and adjudges that those claims have been infringed by the San Jose Canning Company and in so far as it orders a reference to take an account in profits and damages in respect to such infringement. In so far as the decree sustains the validity of the other claims of the patent it is reversed and the injunction with respect to such other or method claims, must be dissolved.

Upon remand the District Court is directed to take such proceedings as shall be according to law and not inconsistent with this opinion.

Costs on appeal to be equally divided.

Affirmed in part and reversed in part.”

Therefore, a sworn statement of account in debtor and creditor form of the profits made by the defendant should properly be formulated by calculating the advantage which the defendant derived from using the complainant's invention as



covered by the aforementioned claims 4 and 5 of the said patent, over what it could have derived from using any other thing or device, process or method, which was known prior to the invention. Complainant, it is thought, is bound to accept as profit nothing more than the advantage effected as a saving of labor by the defendant in the latter's use of the device covered by claims 4 and 5 of the patent. But complainant is estopped from demanding a sworn statement of account in debtor and creditor form of the profits made by defendant from canning string beans, packed asparagus style. The doctrine of standard of comparison applies in any case where a defendant in a patent suit has at his free use and disposal that thing, instrumentality, process or method which may be the next best means for carrying out the particular function or result sought to be attained, citing *Walnut Growers' Assn. vs. Anderson-Barngrover Mfg. Co.*, 166 F. 443, 92 C. C. A. 295; *Doten vs. City of Boston*, 138 F. R. 406, 1905; *Schmertz Wine Glass Co. vs. Western Glass Co.*, 203 F. 1006, decree modified *Western Glass Co. vs. Schmertz Wine Glass Co.*, 226 F. 730, 141 C. C. A. 486; *Brown vs. Lanyon Zinc Co.*, 179 F. 309, 102 C. C. A. 497; *Canda Bros. vs. Michigan Malleable Iron Co.*, 152 F. 178, 81 C. C. A. 420 (C. C. 1910); *American Street Flushing Machine Co. vs. St. Louis Street Flushing Machine Co.*, 180 F. 759, decree affirmed 192 F. 121, 112 C. C. A. 582; *Brookfield vs. Novelty Glass Mfg. Co.* (C. C. 1908), 179 F. 830; affirmed *Novelty Glass Mfg. Co. vs. Brookfield*, 170 F. 946, 95

C. C. A. 516; Seeger Refrigerator Co. vs. American Car & Foundry Co., 212 F. decree 219 F. 565, 135 C. C. A. 333, and in Brown Bag Filling Machine Co. vs. Drohen, 175 F. 576, 99 C. C. A. 192, it was held "That the profits realized by a defendant from the use of an infringing bag filling machine were properly computed on the basis of the saving as compared with the cost of filling by hand, where there was no prior machine which would do the work." In Mowry vs. Whitney, 14 Wallace, 651, 1871, the advantage was a saving of materials and labor, realized from the use of the complainant's process in manufacturing car-wheels, as compared with what would have been necessary to expend in producing similar car-wheels, salable at the same price, without the use of that process. In Cawood patent, 94 U. S. 709, 1876, the advantage was a saving of labor and of fuel, realized from the use of the complainant's swage-block in mending the exfoliated ends of iron railroad rails, as compared with the labor and fuel it would have been necessary to expend in mending those rails upon a common anvil. And in Conover vs. Mevs, 11 Blatch. 198, 1873, the advantage was a saving of labor in splitting kindling wood by means of the patented machine of the complainant, as compared with the labor which would have been required to split the same quantity of wood by hand, or by any other machine. In Webster Loam Co. vs. Higgins, 43 F. R. 675, 1890, the advantage was a saving of machinery for weaving carpets; it appearing, in the aspect of the proofs most favorable to the com-

plainant, that the defendants could have made all the carpeting they did make, if instead of using their sixty-one infringing looms, they had used twice that number of noninfringing looms. On this basis, the complainant contended that it was entitled to recover all the profits which were made by the defendants, on those yards of carpeting which they made on the sixty-one infringing looms, over and above the much smaller number of yards which they could have made on sixty-one noninfringing looms. But that contention was overruled, nothing hindered the defendants from using one hundred and twenty-two noninfringing looms, instead of sixty-one infringing looms, and that the cost of the use of whatever number of noninfringing looms would have been necessary to make the carpeting which was made on the sixty-one infringing looms, was the proper standard of comparison in the case.

In the instant case, this defendant had opened to him a large number of different mechanical devices for packing beans and is capable of furnishing convincing evidence upon this question of the standard of comparison. If, by using the infringing device, the defendant saved on the packing of thirty thousand cases of beans in the period of time representing the infringing interval, the sum of 2¢ per case, the entire sum in profits due the complainant would be six hundred dollars (\$600).

#### DAMAGES.

Covering the canning season of the year 1922, defendant was licensee of the complainant under



the patent in suit. Defendant paid to complainant as consideration for the license the sum of \$500.00. On or about the 3d day of July, 1923, complainant offered to renew the license with the defendant covering the use of the patented invention for the canning season of 1923. The consideration for the 1923 license was to be for the same sum as provided for in the license between the parties in the year 1922. Defendant refused to admit the validity of the patent in suit and the license offered defendant to renew the former license was not accepted.

Defendant has used the infringing device during its canning seasons of 1923 and 1924, and it is thought that the loss by the complainant of license fees that he may have been entitled to for these periods, commensurate with the license fee for the year 1922 is the more than reasonable criterion of the complainant's damage. The actual damage done the complainant could not possibly be for a sum in excess of \$1,000—at the rate of \$500 for each infringing year wherein the device complained of was employed by defendant. In this connection, it should be borne in mind that when the defendant paid over to the complainant the sum of \$500.00 for the license in the year 1922, the patent in suit was presumed to be valid as to all of its claims. Had the method claims of the patent been found to be for a new and patentable invention and accordingly valid and infringed by the defendant, it is only reasonable to say that the value of any license given under the patent



would have been greater or perhaps in proportionate keeping with the license fee covering said period of 1922. But, where on adjudication it is found that as to the method claims, such claims are invalid and not infringed by this defendant it is certainly manifest that the value of any license received under the patent has very materially depreciated. Where an inventor finds it profitable to exercise his monopoly by selling licenses he has himself fixed the average of his actual damage when his invention has been used without his license. If he claims anything above that amount, he is bound to substantiate his claim by clear and distinct evidence. As to this, the best evidence, no doubt, is the assignment made and entered into on the 12th day of May, A. D. 1923, by and between Anthony Greco, the patentee and the complainant Louis Oneal, acting as Trustee with rights and privileges to vend rights under said patent; to grant licenses thereon and thereunder; to make royalty contracts or agreements respecting same; to manufacture and rent or sell and rent any and all devices covered by said patent as recited in said assignment. The estimation of damages must be confined to the particular part of the machine covered by the patent upon which suit is brought. *McCreary vs. Pennsylvania Canal Co.*, 141 U. S. 459, 12 S. Ct. 40, 35 L. Ed. 817; *Fischer vs. Hayes*, 22 Fed. 529; *Burdell vs. Denig*, 4 Fed. Cas. No. 2,142, Fish Pat. Cas. 588; *Carter vs. Baker*, 5 Fed. Cas. No. 2,472, 4 Fish. Pat. Cas. 404, 1 Sawy. 512;

Wayne vs. Holmes, 29 Fed. Cas. No. 17,303, 1 Bond, 27, 2 Fish. Pat. Cas. 20.

Whenever equity has jurisdiction to decree an account of the defendant's profits, it also has jurisdiction to assess the damages which the complainant sustained on account of the defendant's infringement. Having ascertained the amount of both, if the profits are found to exceed the damages, the Court will enter a decree for their recovery, and will do nothing further about the damages. Where the accounting shows no such profits, but does show such damages, the Court will enter a decree for the amount of the latter. Where the accounting shows both profits and damages, and shows the latter to equal or exceed the former, a decree will be entered for the amount of the damages. *Birdsall vs. Coolidge*, 93 U. S. 64, wherein it was held "that when it appears in a case in equity, that the defendant's profits, derived from the use of the plaintiff's invention, do not amount to so much as the plaintiff's damages arising from the infringement, the Court may add to the amount of the defendant's profits a sum sufficient to make the amount awarded by the decree equal to the plaintiff's damages. The two claims found to be valid in the patent in suit form an insignificant part of the alleged invention.

It is well recognized that "what the infringer makes is 'profits,' what the owner of the patent loses by the infringement is 'damages.'" In all of these cases, the burden rests upon the complainant to establish, in every suit for patent infringe-

ment, the validity of his patent. In the instant case, the only valid claims are 4 and 5 on the article. Not a single claim remains in the patent covering any new method or process of packing string beans or other vegetables. But even as to the two claims found valid and infringed, it cannot be said that the defendant confines itself solely to such structure recited and covered by those claims, as the infringing structure embodies other matter, which is a factor in the profits realized by its use, and the burden of proof is upon the complainant to segregate the part of the profits arising from the infringement from the general profits accrued from the infringement, citing *Elizabeth vs. Nicholson Pavement Co.*, 97 N. S. 126, 24 L. Ed. 1000; *Garretson vs. Clark*, 111 U. S. 120, 28 L. Ed. 371; *Canda Bros. vs. Michigan Malleable Iron Co.*, 152 Fed. Rep. 178, 81 C. C. A. 420; *Keystone Mfg. Co. vs. Adams*, 729, 151 U. S. 148, 38 L. Ed. 103.

And as to liability of the user for profits by use alone of the device complained of the Supreme Court has said:

“On the second hearing before the Master, it was shown and he so found and reported, that there were methods and furnaces, and other than those of the plaintiff’s and other than those burning dry fuel alone, which would produce the same results in generating heat, for the purposes for which the defendants used the heat, and which methods and furnaces they had a right to use, and that the savings to them of profits made by them, by use of the plaintiff’s inventions, over the other



furnaces, was not proved. Such being the case, the report could not have been otherwise than it was.

“It does not always follow that because a party may have made an improvement in a machine and obtained a patent for it, another using the improvement and infringing upon the patentee’s rights will be mulcted in more than nominal damages for the infringement. If other methods in common use produce the same results, with equal facility and cost, the use of the patented invention cannot add to the gain of the infringer, or impair the just rewards of the inventor. The inventor may indeed prohibit the use, or exact a license fee for it, and if such license fee has been generally paid, its amount may be taken as the criterion of damage to him when his rights are infringed. In the absence of such criterion, the damages must necessarily be nominal.” (Mr. Justice Field, in *Black vs. Thorne*, 111 U. S. 122, 28 L. Ed. 372, and, quoting from *Hopkins on Patents*, Vol. 1, page 613, we find that—

“The curious suggestion of the foregoing quotation is that there may be a valid patent for a new machine which produces the same results, with the same facility and at the same cost as the machine of the prior art. But from another view point it would seem that these expressions were employed to show that unless the complainant shows a saving, in time, money or otherwise by the use of his invention, or that it accomplishes a new result, it cannot be presumed that the defendant user has



profited by the use of the invention; if no such saving or advantages in the use of the patent exists, it can hardly possess the essential requirements of a valid patent, and it is, indeed, difficult to see why an accounting should be ordered, as against one who infringes by use alone.”

Defendant has infringed no valid method claims of the patent in suit. It did use a device which the Honorable Court above held to be an infringement of the specific article claims 4 and 5 of the patent.

Counsel for defendant believes that he is fully justified at this time in bringing these matters to the attention of the Master. However, and for the purpose and for such advantage and effect as it may have the statement of account in debtor and creditor form of profits made in the packing of beans by means of the invalid method (Claims 1, 2, 3 and 6) and with the device (valid claims 4 and 5) is furnished herewith.

In support of the law that “the advantage which a defendant derives from using complainant’s patented invention over what it could derive from any other process or thing which was known prior to that invention constitutes the profits which the complainant is entitled to recover, where the amount can be ascertained with a reasonable degree of certainty,” defendant submits this, a true summary of the cost to it in packing its beans by one of the next best known ways as against the amount which the defendant realized in saving of time and labor through use of the device, claims 4 and 5 of the

patent in suit. Defendant has separated the profits due to the infringing device from those due to the noninfringing device and it is believed that any recovery above such nominal amount as the Honorable Master shall allow will be according to law and not inconsistent with the opinion of the Honorable Circuit Court of Appeals.

The points discussed cover the main question before the Master where the suit, originally brought on six patent claims, is now reduced to two. If, as the Honorable Court above said, "But we see no merit in the claims for the method of canning beans by arranging them in bunch formation within an encircling mold, then placing one end of the mold in contact with the open end of a can, causing the beans to move from the mold into the can" \* \* \* what is the value through use by defendant of (1) lock means for holding the mold in locked position, and (2) an outwardly projected flange on the mold adjacent one of its ends, as set forth in claim 4, or the value of the sole projected flange on the mold as set forth in claim 5? What, (if any) profit, or damage, was attributable to defendant's use of said flange or said lock means or both? Beans can be packed with employing either of the limitations of the specific claims 4 and 5 which are for the article *per se*. Defendant knows what it costs it to pack beans by the hand method. It does not follow from the mere fact of use that defendant profited by its use of the invention. But apportionment is required in the case of a patented improvement

which contributes to a machine only part of the whole value, and the present case is in that category. Defendant does not wish to confuse values or profits; nor will it place any difficulty in the way of an equitable apportionment of profits, but the burden of proof is on complainant. Defendant has taken up this question of burden of proof, and in the foregoing has demonstrated the unsoundness and falsity, in fact, of all complainant's assertions, assumptions and theories advanced up to this time on this question of profits and damages. Defendant will assume the burden of proof under the rule of *Westinghouse vs. Wagner* (225 U. S. 604). It will furnish the facts needed to discover what value in use is apportionable to the Greco improvements, and from these facts only a nominal recovery can lawfully be deduced.

On this question of profits, damages and apportionment, and the advantage, if any, derived by the defendant by its use of the invention, the record of the case speaks for itself. It makes clear the fact beyond any peradventure of doubt that if the method claims of the patent fell (found invalid), there was left little or nothing of value. Proof of this may be clearly gathered from the words of the witness Carlos P. Griffin (*Trans.*, p. 78) when he said in answer to the question appearing at the bottom of *Trans.*, p. 77, "No, it doesn't, because the beans can be put in the mould in any one of a number of different ways, and I might throw the mould out of the window or throw it out in the street." It would seem from this



statement of the expert witness that the physical specific mould was entirely unnecessary and superfluous. It had no real value except that which might fairly cover its bare cost of manufacture. In other words, the witness could use his hands to pack beans and still come within the method claim. And the question (Trans., p. 75) brought forth the answer (Trans., p. 76), "It would depend entirely upon whether the product was so near this product as to be suggestive of the process, and whether that process had actually been used previously." On this point, the patent in suit, lines 99, 100 inclusive thereof, says:

"While the invention has been described for use in connection with the canning of beans, it is obvious that the same is applicable to the canning of asparagus or any similar vegetable desired to be placed within cans in bunch formation."

The application of the patent in suit was filed in the Patent Office May 7, 1917.

The very obvious use of the invention in the packing of asparagus had been resorted to by Perry as far back as 1912 (Sup. Trans., p. 18). Obviously string beans and asparagus are the same for the purpose of the invention. Perry had outgrown the idea of [110] placing the asparagus stalks in the can singly. He adopted the more modern way of putting them all in at once by means of a mold.

Perry's mold was old and well known for many years prior to any date of invention of the device



covered by the patent in suit. Asparagus and beans are similar. The mold can be used for packing beans. It is a mechanical means as distinguished from a hand operation. Its use might affect a material saving over the use of a hand operation. It had no lock means for holding the mold closed. This was unnecessary. It had no stop flange to limit its movement into the can. This was likewise unnecessary.

### COMPUTATION.

Quantity of beans packed asparagus

style .....32,400 cases.

Defendant's business is not confined to the packing of beans asparagus style. In the years 1923-1924 its business included the packing of

1. Beans Asparagus style.
2. Beans (Cut style).

The total number of cases, namely, 32,400, represents 40 per cent of the total tonnage of beans purchased in the years 1923, 1924. The cost per ton of beans in the year 1923 (market value) was ..... \$80.00  
and in the year 1924 .....\$80.00—\$100.00

On purchasing its beans, those of the choicest variety are selected for the so-called asparagus style pack. The residue is again graded, cut up and canned and sold wholesale at prices ranging from \$1.00 per dozen for those of an inferior grade to \$1.35 per dozen for those of a better grade. Both the asparagus style beans and the cut style undergo the same treatment common in the

art of canning. In view of the fact that all of the beans during certain stages of treatment are handled in the same manner until finally made ready for the market, it is quite difficult to arrive at a true accounting of the relative costs of handling these two styles of the finished produce.

After the beans were sorted to obtain those for the asparagus pack, use was made of the infringing device whereby these beans could be placed in bunch formation and transferred to cans. This work was conducted by operatives working on a piece basis wherein an operative's tray contains 19 filled cans at the rate of ..... .19 per tray  
or .01 per can.

The number of cases of beans asparagus style sold by defendant and the names of the persons to whom said beans were sold, together with the amounts received therefor and the dates thereof are as follows:

1923. SHIPMENTS OF ASPARAGUS STYLE STRING BEANS.				
Sept. 4.	Allen & Lewis.....	500 cs.	@ \$2.00	per doz.
Sept. 29.	Amos James Grocery Co.....	75 cs.	@ \$2.00	per doz.
Oct. 25.	Amos James Grocery Co.....	75 cs.	@ \$2.00	per doz.
Oct. 21.	William Cluff Co. ....	250 cs.	@ \$2.00	per doz.
Sept. 14.	Coast Wholesale Gro. Co. ....	30 cs.	@ \$2.00	per doz.
Sept. 17.	Coast Wholesale Gro. Co. ....	100 cs.	@ \$2.00	per doz.
Aug. 18.	Coast Wholesale Gro. Co. ....	70 cs.	@ \$2.00	per doz.
Aug. 1.	Coast Wholesale Gro. Co. ....	100 cs.	@ \$2.00	per doz.
Aug. 24.	William Cluff Co. ....	250 cs.	@ \$2.00	per doz.
Aug. 14.	Calif. Wholesale Gro. Co. ....	500 cs.	@ \$2.00	per doz.
Aug. 1.	Christopher Merc. Co. ....	200 cs.	@ \$2.00	per doz.
Oct. 23.	Evan W. Hook & Co. ....	50 cs.	@ \$2.00	per doz.
Oct. 29.	Hall Luhrs & Co. ....	100 cs.	@ \$2.00	per doz.
Oct. 24.	Hooper & Jennings .....	150 cs.	@ \$2.00	per doz.
Aug. 6.	Hooper & Jennings .....	100 cs.	@ \$2.00	per doz.
Sept. 20.	Hooper & Jennings .....	20 cs.	@ \$2.00	per doz.

1923. (Continued).

Aug.	7.	Haas Bros. ....	100 cs.	@ \$2.00	per doz.
Aug.	13.	Haas Bros. ....	100 cs.	@ \$2.00	per doz.
Aug.	24.	Haas Bros. ....	100 cs.	@ \$2.00	per doz.
Aug.	24.	Haas Bros. ....	375 cs.	@ \$2.00	per doz.
Oct.	8.	H. Jevne Co. ....	750 cs.	@ \$2.00	per doz.
Aug.	14.	H. Jevne Co. ....	250 cs.	@ \$2.00	per doz.
Oct.	18.	Kockos Bros. ....	50 cs.	@ \$2.00	per doz.
Oct.	13.	Klauber Wangenheim Co. ....	25 cs.	@ \$2.00	per doz.
Aug.	8.	Klauber Wangenheim Co. ....	25 cs.	@ \$2.00	per doz.
Sept.	13.	H. Kellogg & Sons ....	100 cs.	@ \$2.00	per doz.
Sept.	18.	Keystone Co. ....	100 cs.	@ \$2.00	per doz.
Aug.	7.	Kern Grocery Co. ....	20 cs.	@ \$2.00	per doz.
Sept.	8.	Letts-Mellick Gro. Co. ....	100 cs.	@ \$2.00	per doz.
Aug.	7.	E. Marre & Bro. ....	50 cs.	@ \$2.00	per doz.
Aug.	25.	E. Marre & Bro. ....	50 cs.	@ \$2.00	per doz.
Oct.	21.	E. Marre & Bro. ....	25 cs.	@ \$2.00	per doz.



1923. (Continued).

Sept.	4.	Mason Ehrman Co. ....	500 cs.	@ \$2.00	per doz.
Aug.	6.	J. H. Newbauer & Co. ....	75 cs.	@ \$2.00	per doz.
Sept.	6.	Sussman Wormser & Co. ....	700 cs.	@ \$2.00	per doz.
Sept.	19.	Sussman Wormser & Co. ....	800 cs.	@ \$2.00	per doz.
Oct.	26.	Sussman Wormser & Co. ....	212 cs.	@ \$2.00	per doz.
Aug.	7.	Smart & Final Co. ....	15 cs.	@ \$2.00	per doz.
Sept.	14.	Smart & Final Co. ....	20 cs.	@ \$2.00	per doz.
Aug.	7.	Scheer & Co. ....	25 cs.	@ \$2.00	per doz.
Sept.	4.	Sprague Warner & Co. ....	500 cs.	@ \$2.00	per doz.
Aug.	7.	San Joaquin Gro. Co. ....	50 cs.	@ \$2.00	per doz.
Aug.	14.	Seeman Bros. ....	250 cs.	@ \$2.00	per doz.
Aug.	14.	Simpson Ashby Co. ....	250 cs.	@ \$2.00	per doz.
Sept.	12.	Tillman & Bendel ....	750 cs.	@ \$2.00	per doz.
Aug.	18.	Tillman & Bendel ....	100 cs.	@ \$2.00	per doz.
Aug.	6.	Wellman Peck & Co. ....	100 cs.	@ \$2.00	per doz.
Aug.	18.	Wellman Peck & Co. ....	100 cs.	@ \$2.00	per doz.

1923. (Continued).

Sept. 7.	Wellman Peck & Co. ....	200 cs.	@ \$2.00	per doz.
Sept. 12.	Wellman Peck & Co. ....	150 cs.	@ \$2.00	per doz.
Aug. 14.	R. C. Williams & Co. ....	425 cs.	@ \$2.00	per doz.
TOTAL NUMBER OF CASES PACKED IN 1923 .....10,012 cases.				

## 1924. SHIPMENTS OF ASPARAGUS STYLE STRING BEANS.

Aug. 1.	Haas Bros. ....	300 cs.	@ \$2.00	per doz.
Aug. 1.	Sussman Wormser & Co. ....	300 cs.	@ \$2.00	per doz.
Aug. 9.	Keystone Co. ....	25 cs.	@ \$2.00	per doz.
Aug. 10.	Tillman & Bendel ....	100 cs.	@ \$2.00	per doz.
Aug. 12.	H. Jevne Co. ....	550 cs.	@ \$2.00	per doz.
Aug. 15.	J. H. Newbauer & Co. ....	200 cs.	@ \$2.00	per doz.
Aug. 16.	Sussman, Wormser & Co. ....	100 cs.	@ \$2.00	per doz.
Aug. 16.	Mason Ehrman & Co. ....	200 cs.	@ \$2.00	per doz.
Aug. 16.	Allen & Lewis ....	500 cs.	@ \$2.00	per doz.

1924.(Continued).

Aug.	17.	Wellman Peck & Co. ....	100 cs.	@ \$2.00	per doz.
Aug.	19.	Timman & Bendel .....	100 cs.	@ \$2.00	per doz.
Aug.	19.	Hooper & Jennings .....	200 cs.	@ \$2.00	per doz.
Aug.	19.	William Cluff Co. ....	400 cs.	@ \$2.00	per doz.
Aug.	21.	Wellman Peck & Co. ....	400 cs.	@ \$2.00	per doz.
Aug.	21.	Haas Bros. ....	700 cs.	@ \$2.00	per doz.
Aug.	22.	Tillman & Bendel .....	600 cs.	@ \$2.00	per doz.
Aug.	24.	Hall Luhrs & Co.....	100 cs.	@ \$2.00	per doz.
Aug.	26.	San Joaquin Grocery Co. ....	100 cs.	@ \$2.00	per doz.
Aug.	27.	Coast Wholesale Grocery Co. ....	50 cs.	@ \$2.00	per doz.
Aug.	27.	Simpson Ashby Co. ....	250 cs.	@ \$2.00	per doz.
Aug.	27.	Adrein Loeb Co. ....	500 cs.	@ \$2.00	per doz.
Aug.	28.	Coast Wholesale Grocery Co. ....	25 cs.	@ \$2.00	per doz.
Aug.	28.	Haas Bros. ....	800 cs.	@ \$2.00	per doz.
Aug.	30.	William Cluff Co. ....	750 cs.	@ \$2.00	per doz.
Aug.	31.	Smith Lynden & Co. ....	25 cs.	@ \$2.00	per doz.

## 1924. (Continued).

Sept.	2.	Tillman & Bendel .....	200 cs.	@ \$2.00	per doz.
Sept.	5.	Hooper & Jennings .....	200 cs.	@ \$2.00	per doz.
Sept.	5.	Kockos Bros. ....	75 cs.	@ \$2.00	per doz.
Sept.	5.	Seeman Bros. ....	1000 cs.	@ \$2.00	per doz.
Sept.	6.	Sussman Wormser & Co. ....	500 cs.	@ \$2.00	per doz.
Sept.	6.	Wellman Peck & Co. ....	250 cs.	@ \$2.00	per doz.
Sept.	7.	Keystone Co. ....	40 cs.	@ \$2.00	per doz.
Sept.	7.	Lindley & Co. ....	300 cs.	@ \$2.00	per doz.
Sept.	7.	Hall Luhrs & Co. ....	50 cs.	@ \$2.00	per doz.
Sept.	8.	R. C. Williams & Co. ....	984 cs.	@ \$2.00	per doz.
Sept.	11.	Kockos Bros. ....	75 cs.	@ \$2.00	per doz.
Sept.	12.	Spragus Warner & Co. ....	750 cs.	@ \$2.00	per doz.
Sept.	17.	Mayflower Stores .....	500 cs.	@ \$2.00	per doz.
Sept.	18.	Haas Bros. ....	800 cs.	@ \$2.00	per doz.
Sept.	18.	William Cluff Co. ....	200 cs.	@ \$2.00	per doz.
Sept.	18.	E. Marre & Bro. ....	75 cs.	@ \$2.00	per doz.



1924. (Continued.)

Sept. 20.	Wellman Peck & Co.....	150 cs.	@ \$2.00	per doz.
Sept. 22.	Smart & Final Co.....	50 cs.	@ \$2.00	per doz.
Sept. 23.	J. H. Newbauer & Co. ....	50 cs.	@ \$2.00	per doz.
Sept. 24.	Coast Wholesale Gro. Co. ....	40 cs.	@ \$2.00	per doz.
Sept. 26.	William Cluff Co. ....	275 cs.	@ \$2.00	per doz.
Sept. 27.	E. Marre & Bro. ....	40 cs.	@ \$2.00	per doz.
Sept. 30.	Haas Bros. ....	576 cs.	@ \$2.00	per doz.
Sept. 30.	Allen & Lewis ....	283 cs.	@ \$2.00	per doz.
Sept. 30.	H. Jevne Co. ....	446 cs.	@ \$2.00	per doz.
Oct. 4.	Sussman Wormser & Co. ....	539 cs.	@ \$2.00	per doz.
Oct. 7.	Scheer & Co. ....	50 cs.	@ \$2.00	per doz.
Oct. 8.	Simpson Ashby Co. ....	100 cs.	@ \$2.00	per doz.
Oct. 8.	Sprague Warner & Co. ....	300 cs.	@ \$2.00	per doz.
Oct. 9.	Tillman & Bendel ....	225 cs.	@ \$2.00	per doz.
Oct. 10.	Keystone Co. ....	5 cs.	@ \$2.00	per doz.

1924. (Continued.)

Oct.	15.	R. C. Williams & Co. ....	1000	cs.	@	\$2.00	per doz.
Oct.	16.	Adrein Loeb .....	200	cs.	@	\$2.00	per doz.
Oct.	16.	H. Jevne Co. ....	404	cs.	@	\$2.00	per doz.
Oct.	18.	Hooper & Jennings .....	125	cs.	@	\$2.00	per doz.
Oct.	18.	Smith Lynden & Co. ....	10	cs.	@	\$2.00	per doz.
Oct.	21.	San Joaquin Grocery Co. ....	75	cs.	@	\$2.00	per doz.
Oct.	21.	Smart & Final Co. ....	20	cs.	@	\$2.00	per doz.
Oct.	21.	Allen & Lewis .....	267	cs.	@	\$2.00	per doz.
Oct.	21.	Coast Wholesale Gro. Co. ....	130	cs.	@	\$2.00	per doz.
Oct.	22.	J. H. Newbauer & Co. ....	100	cs.	@	\$2.00	per doz.
Oct.	23.	Mason Ehrman & Co. ....	150	cs.	@	\$2.00	per doz.
Oct.	25.	Wellman Peck & Co. ....	150	cs.	@	\$2.00	per doz.
Oct.	25.	William Cluff Co. ....	125	cs.	@	\$2.00	per doz.
Oct.	27.	Seeman Bros. ....	1000	cs.	@	\$2.00	per doz.
Oct.	29.	Lindley & Co. ....	50	cs.	@	\$2.00	per doz.

1924. (Continued.)

Oct. 29.	Christopher Merc. Co. ....	70 cs.	@ \$2.00	per doz.
Nov. 3.	H. Kelloggs & Sons .....	210 cs.	@ \$2.00	per doz.
Nov. 5.	Tillman & Bendel .....	17 cs.	@ \$2.00	per doz.
Nov. 9.	Haas Bros. ....	324 cs.	@ \$2.00	per doz.
Nov. 18.	Scheer & Co. ....	20 cs.	@ \$2.00	per doz.
Nov. 19.	Kern Grocery Co. ....	5 cs.	@ \$2.00	per doz.
Nov. 20.	E. Marre & Bro. ....	60 cs.	@ \$2.00	per doz.
Dec. 30.	Dodge Sweeney & Co. ....	1000 cs.	@ \$2.00	per doz.
Dec. 30.	Dodge Sweeney & Co. ....	322 cs.	@ \$2.00	per doz.
1925.				
Feb. 26.	Dodge Sweeney & Co. ....	8 cs.	@ \$2.00	per doz.
Mar. 19.	Coast Wholesale Gro. Co. ....	43 cs.	@ \$2.00	per doz.
TOTAL NUMBER OF CASES PACKED IN 1924 .....				
				22,388 cases.

In the years 1925–1926 defendant packed its asparagus style beans by hand and the costs to arrange and deposit the beans within the cans were—1925 per tray of 19 cans, .22, and 1926, per tray of 19 cans, .20.

The average brokerage commission paid on all sales schedule above, packs of 1923–1924 was 3%.

The advantage to defendant incident to use by it in the years 1923–1924 of the infringement (claims 4 and 5) is properly computed on the basis of the savings (costs manual help) as compared with the costs to fill the cans by hand as resorted to by the defendant in the pack (asparagus style) 1925–1926 and on such basis the following is submitted:

1923.

10,012—No of cases.

24—No of cans in case.

---

40,048

200 24

---

240,288—total cans.

.01—cost per can.

---

\$2,402.88—labor cost for 10,012 cases @ .01 per can.

1924.

22,388—cases.

24—No. of cans in 1 case.

---

89,552

447 76

---

537,312—total cans.

.01—cost per can.

---



\$5,373.12—labor cost for 22,388 cases @ .01 per can.

1925 Compared with 1923.

(No. of cans in tray) 19) 240288 —cans.

12646.736—No. of trays.

12646.74 —No. of trays.

.03 —additional cost  
by hand.

---

\$379.4022 additional cost  
by hand.

1926 Compared with 1924.

19) 537312 —cans.

28279.576—No of trays.

28279.58 —No. of trays.

.01 —additional cost  
by hand.

---

\$282.7958 additional cost  
by hand.

### COMPARISON.

Cost 1923—1924

Costs 1925—1926

(By Hand)

1923—\$2,402.88

1925—\$2,782.28

1924— 5,373.12

1926— 5,655.91

---

\$7,776.00

---

\$8,438.19

\$8,438.19—1923-24

7,776.00—1925-26

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\$662.19—Saving to defendant  
incident to infringement.  
[118]

State of California,

City and County of San Francisco,—ss.

I. Rancadore makes solemn oath and says: I am the secretary of San Jose Canning Company, defendant. So much of the foregoing statement of account as concerns my own acts and deeds is true to the best of my own knowledge: and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

I. RANCADORE.

Sworn to before me this 14th day of October, 1926.

[Seal]

C. B. SESSIONS,

Notary Public, in and for the City and County of San Francisco, State of California.

Recd. copy hereof 10/14/26.

PRESTON & DUNCAN.

ROBERT E. HATCH.

[Endorsed]: Filed June 8th, 1928.

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(Title of Court and Cause.)

NOTICE OF MOTION FOR FURTHER ACCOUNTING.

Before HARRY M. WRIGHT, Special Master.  
To the Defendant Above Named and to Its Attorneys:

You and each of you will please take notice that the plaintiff above named will, on Monday, the 30th

day of January, 1928, at the hour of 10 o'clock, A. M., or as soon thereafter as counsel can be heard, at the office of Harry M. Wright, Esquire, Special Master herein, 68 Post Street, San Francisco, California, move said Special Master for an order requiring the defendant to make out and deliver to said Special Master, a further sworn statement of account in debtor and creditor form showing the profits made by defendant from the canning and sale of string beans, packed asparagus style by the use of the device or devices set forth in the pleadings on file herein.

Said Motion will be based upon all of the records, papers and files herein and this notice of motion.

ROBERT DUNCAN,  
CLARENCE A. LINN,  
Attorneys for Plaintiff.

Receipt of a copy of the within notice of motion for further act, admitted this 11th day of January, 1928.

A. SCHAPP,  
Attorney for San Jose Canning Co.

[Endorsed]: Filed Jun. 8, 1928.

(Title of Court and Cause.)

NOTICE OF MOTION TO AMEND THE  
ORDER OF THE SPECIAL MASTER FOR  
AN ACCOUNTING IN DEBTOR AND  
CREDITOR FORM, DATED SEPTEMBER  
1, 1926.

To the Plaintiff Above Named and to the Attorneys:

You and each of you will please take notice that the defendant above named will, on Monday, the 30th day of January, 1928, at the hour of 10:00 o'clock A. M. or as soon thereafter as counsel can be heard, at the office of Harry M. Wright, Esq., Special Master herein, 68 Post Street, San Francisco, Calif., move said Special Master for an order that the said Master's order of September 1st, 1926, requiring the defendant to make a sworn statement of account in debtor and creditor form of the profits made by the use of the infringing mold be amended in the following respects:

Page 1 of said order, line 8 of the paragraph beginning with "NOW, THEREFORE," after "packed asparagus style" insert by means of the infringing mold.

Same page, under (1), after "asparagus style" insert by means of the infringing mold and cancel "and the amount of money paid therefor."



Pages 1 and 2, cancel paragraph under (4) and substitute: Cost of filling the cans by means of the infringing mold.

Page 2, cancel paragraphs under (5), (6) and (7) and substitute: (5) Cost of filling the cans by means of a standard of comparison.

This motion will be based upon all the records, papers, and files herein, and this notice of motion, and upon the ground that under the law profits in a case of infringement where the infringement consists in the use of an infringed article only are to be computed by a comparison of the advantage gained by the use of the infringing article over that gained by the use of the next best noninfringing article at the disposal of the defendant.

A. SCHAPP,  
Attorney for Defendant.

Receipt of the within notice is hereby admitted this 24th day of January, 1928.

ROBERT DUNCAN,  
C. A. LINN,  
Plaintiff's Attorneys.

[Endorsed]: Filed June 8, 1928.

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(Title of Court and Cause.)

MASTER'S OPINION AND ORDER.

Equity Rule 63, requiring parties accounting before a Master to bring in their respective accounts

in the form of debtor and creditor, undoubtedly originated in and has its most obvious and ready application to ordinary accounts such as those of a partner or trustee, or the like, where a set of books would show money items on each side of the account. The practice prescribed obviously makes it possible for the complainant, upon receiving the discovery embodied in the Rule, to accept certain items and narrow the hearing before the Master to items that are disputed either in fact or in law. Accountings of profits in patent cases differ widely from the situation presented in ordinary accounts, as anyone experienced in such accountings will realize. Books of account in patent accountings may serve as sources of material, but rarely contain the ultimate figures of debit and credit desired, making necessary the use of estimates. The machinery of Rule 63, therefore, labors considerably in the effort to grind out the results desired, but since discovery is of right and the fundamental principle of narrowing the issues at the hearing is here equally pertinent, courts of equity in this country have usually applied Rule 63 to patent accountings and it is the practice in this District. The very broad powers of the Master under Rule 62 would, in my opinion, give him power to require the filing of the statement under Rule 63, even if the latter did not exist. Though it is customary here for the Master to order the filing of a debtor and creditor statement as the first step in the accounting, the practice adapted to settle the issues is quite unsettled. It must not be forgotten, also, that while the Master

has broad powers of regulation, he is necessarily ignorant of the requirements of the particular situation and it, therefore, falls in the first instance upon the plaintiff's counsel to draft the Master's order requiring the filing of the account under Rule 63, and to insert therein the particular details in the nature of discovery, which, in counsel's opinion are best adapted to ascertain the profits due. Equally, it would seem, is the burden then cast upon counsel for the accounting defendant either to obey the order as given or, by timely motion before the Master, to attempt a correction of the Master's order. I see no reason furthermore why, in this described program of settling the issues, there may not be occasions for taking evidence just as in equity evidence may be taken in a preliminary hearing in support of a plea. For example, it seems to me that it would be a correct and desirable practice in accountings before the Master that there be a preliminary hearing that would be proper in particular cases to determine the standard of comparison to be applied in the particular case. An experience of eighteen years as a Master of this court has not determined any settled practice in this regard, and these observations are called forth solely by the facts of the present case with the idea that they should be generally applicable.

The facts of the present situation are as follows:

On June 26, 1925, the Master signed an order for a statement under Rule 63 with certain detailed requirements under seven headings deemed by plaintiff necessary to determine the profits made by the



defendant from canning string beans packed asparagus style. Thereupon, as is not unusual, the matter rested in the Master's files. There is no proof in my files that said order was served, nor was the original returned. Meanwhile an appeal had been taken from the interlocutory decree, and on January 18, 1926, 10 Federal 2d, page 100, the Circuit Court of Appeals affirmed the decree below as to infringement of claims covering the device, but reversed it as to claims covering the method of packing, stating that this method was nothing more than the obviously necessary manner of operating the mechanism.

On September 1, 1926, there was presented to me by plaintiff and signed a second order for filing of an account under Rule 63 substantially similar to the one issued in 1925.

On October 14, 1926, there was filed with me defendant's verified statement of account. This statement is preceded by a long discussion setting forth the modification of the decree by the Court of Appeals and an argument on the law largely directed to development of defendant's view that the original Master's order was too broad. The Master does not read documents filed with him, unless counsel moves them to his attention.

Following this statement of the law is an account giving some of the discovery ordered by the Master's order and disregarding, to a large extent, the balance of the order, and concluding with a statement of the profits on the theory that it was open to defendant to use as a standard of comparison the



costs of packing string beans asparagus style by hand. Obviously the practice followed by the defendant of disobeying the Master's order and making discovery according to his own notions of what the order should have been was unsound, and, if it were thought necessary, would expose the defendant to punishment for contempt.

Defendant's counsel should have moved for a modification of the order.

Following this filing of the account, plaintiff noticed a motion for the 30th of January, 1928, for a further sworn statement of account under Rule 63, and on the date named, I was attended by Clarence A. Linn, Esquire, counsel for plaintiff, in support of the motion, and by A. Schapp, Esquire, for defendant. At the same time, defendant presented a motion for modification of the order, the purport of which was to confine the costs to the use of the infringing mold or device and to introduce into the details required an item of cost of filling the cans by defendant's selected standard of comparison. No evidence was offered or taken, and the only light I have on the situation is the argument of counsel, aided to some extent by the disclosure made in the account filed.

From this account, as well as from the argument, it would appear that the first issue to be decided is that of the proper standard of comparison. From the account, page 5 and following, I gathered that defendant was a licensee of the plaintiff under the patent in suit, paying therefor a yearly royalty of five hundred (\$500) dollars. A renewal of the li-

cense for 1923 was not accepted by the defendant, who, during that year and 1924 used the device decreed to be an infringement.

In 1925 and 1926, as stated in this account, page 19, the defendant packed its asparagus style beans by hand. Its account of profits is founded on the difference in cost between the costs of filling in 1923 and 1924 compared with the greater cost of hand filling in 1925 and 1926, showing a saving by the infringement of \$662.19.

The complainant's contention, on the other hand, is that the packing of string beans whole, lengthwise in the can, in the manner of asparagus stalks was not known in the art until plaintiff's device, two semi-circular molds with certain accessories, which bunch the beans and facilitate their insertion into the cans, created that particular style of packing; that prior thereto, string beans were not packed asparagus style by hand, but were packed cut up into pieces. Plaintiff's contention, accordingly, is that the selected standard of hand packing is not applicable under the law and that plaintiff is entitled to the entire profits of defendant for beans packed by the infringing device in the asparagus style originated by plaintiff, there being no hand operation for such packing then known.

It is, of course, settled law that a device or method not known at the time of the infringement is not available as a standard of comparison, 277, Federal, 177; Walker, Section 725. If plaintiff is correct on the facts, his claim that he is entitled to all the profits of beans packed asparagus style, with-

out reference to any standard of comparison, would seem on my present understanding to be correct.

Considering the delay and the failure of defendant to earlier move in modification of the order, I might well grant a motion to comply with the order as given. The unsettlement of the practice seems, however, to suggest that before defendant is required to make a further accounting, a more lenient view should prevail and that we should now proceed as we should have proceeded if defendant had moved in modification of the order as soon as it was given.

The point upon which light is needed by evidence is as to state of the art in the years 1923 and 1924, with a view of determining the proper standard of comparison to be applied. The burden of proving the standard of comparison, whether it be the hand operation of some other means, rests on defendant, and a hearing should be had at which defendant, as the moving party, will present evidence, the plaintiff to be heard in reply. If defendant does not convince the Master that hand operation, or some other standard of comparison, was open to defendant during the period of infringement, defendant must be prepared within a brief time thereafter to file a further statement of account of its entire profits in packing beans asparagus style as prayed for by plaintiff.

I will appoint Monday, February 27, 1928, at 10 o'clock A. M., at my office, Room 706 at 68 Post Street, San Francisco, California, as the time and

place for hearing evidence as to the standard of comparison to be used.

Dated January 31, 1928.

H. M. WRIGHT,  
Special Master.

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(Title of Court and Cause.)

TRANSCRIPT OF PROCEEDINGS BEFORE  
SPECIAL MASTER.

Monday, February 27, 1928.

Counsel Appearing:

For Plaintiff: CLARENCE A. LINN, Esq.

For Defendant: R. M. J. ARMSTRONG, Esq.  
A. SCHAPP, Esq.

Mr. ARMSTRONG.—I think we will put on Mr. Rancadore, first; I am putting him on without prejudice, and except to the ruling of the Master that the burden is on the defendant to show that there were other methods that he might have used, for the purpose of comparison, and I would like the ruling of the Master upon that.

The MASTER.—The objection is overruled and an exception may be noted.

TESTIMONY OF I. RANCADORE, FOR  
DEFENDANT.

I. RANCADORE, called for the defendant, sworn.

Mr. ARMSTRONG.—Q. Mr. Rancadore, you are an officer of the defendant, San Jose Canning Company?



(Testimony of I. Rancadore.)

A. Yes.

Q. What is your position in that company?

A. Secretary, treasurer, and general manager.

Q. How long have you held that position?

A. The position of general manager I have held since the company was organized. I was president and general manager at the beginning.

Q. When was the company organized?

A. In 1919.

Q. You were then general manager? A. Yes.

Q. And have been general manager ever since?

A. Yes.

Q. When did you first become an officer of the company?

A. 1919, when the company was organized.

Q. At that time you were president? A. Yes.

Q. And afterward became secretary-treasurer and someone else became president then?

A. I turned it over to my father; my father is president now.

Q. Do you remember the packing season of 1922?

A. Yes.

Q. In 1922 did you experiment with packing beans in bunch form, so-called asparagus style?

A. Yes.

Q. Will you explain to the Court just what you did at that time, and, if possible, about the time in 1922 when you did it?

A. It was in the latter part of July, that is, when we got started packing string beans. I worked under a license from Anthony Greco.

(Testimony of I. Rancadore.)

Q. In 1922?

A. In 1922, and as soon as we got started packing string beans, I was wondering if something could be accomplished by hand without using any mold of any kind, so I told my assistant superintendent, Mr. Cusimano, to try and get up a form so that it would hold enough beans in there to fit into a can, and we tried several forms, and we finally got enough beans in this form to fit the No. cans. This is the kind that we generally use in packing our string beans, except these are a little higher.

Q. That is the form, except the uprights were a little higher?

A. They were higher before. So we tried it and about half a dozen cans were packed, and we saw we could fit them exactly as the mold did, make a very good pack; more beans go into a can with that than with a mold, due to the fact that the mold is a little bit narrower than the can, itself. In bunch form, we could put in as much beans as the cans will hold. Naturally, if the girls put in too many beans, they could pull some out, half a dozen or so.

Q. That is, with the mold?

A. No, with this, here.

Q. With a mold it sometimes went under the required number of beans?

A. Yes, depending on the canner; if she did not put enough beans into the mold, naturally the can would be slack, and there wouldn't be enough beans

(Testimony of I. Rancadore.)

in there to make a good pack, and when you open up a can the beans, instead of standing up in a bunch, will fall apart.

Q. At the time that you made this experiment, did you make any attempt to figure what the difference in cost might be?     A. No, we did not.

Q. Now, you spoke of a license from the Grecos. From that I understand you mean the owners of the patent that had been issued prior to that time to Mr. Anthony Greco. That was the Greco you mean?     A. Yes, the Greco patent.

Mr. ARMSTRONG.—It will be stipulated, I think, that that is the patent in controversy?

Mr. LINN.—Yes.

Mr. ARMSTRONG.—Q. At that time did you go out and solicit the use of that patent?

A. Why, yes, I did. I was told, in fact, that both Anthony Greco and Victor Greco claimed that he was the owner of the patent.

Q. Did they come to you or you go to them?

A. I think I went to them. I went to them, and Anthony Green claimed that he was the owner of the patent, and, in fact, at that time the patent was in dispute, I believe, they had a lawsuit to prove the ownership of the patent at that time, and I personally was convinced through the advice of the attorney of Anthony Greco that Anthony Greco was the owner of the patent, and, if anything, I should do business with Anthony Greco, and not with Victor Greco.

(Testimony of I. Rancadore.)

Q. Well, was there any particular reason why you at that time experimented with hand packing?

A. That was in 1922. I had a license for that year.

Q. I am talking about 1922, when you had the license, was there some conversation about your lack of right, with the Grecos—your Honor understands that they were the assignors of the patent.

The MASTER.—I understand.

Mr. ARMSTRONG. — Q. (Continuing.) Was there some conversation with either of them or both of them as to your lack of right to pack beans in bunch form, or asparagus form? A. Yes.

Q. Can you give that conversation?

A. Mr. Victor Greco threatened that he would stop us whether we packed string beans, or not, inasmuch as he had a patent on that particular pack, and nobody could pack string beans, no matter how they put them in the can, that he had a patent that covered that method.

Q. Was that one of the things that moved you to take this license?

A. Naturally. If I knew at that time I had the right to pack them by hand I would never negotiate with anybody when I could do it without taking any license.

Q. These threats came at the beginning of the pack? A. At the beginning of the pack.

Q. Just when the pack is about to start?

A. Even though I had a license from Victor



(Testimony of I. Rancadore.)

Greco, Anthony started a restraining order against us that year.

Q. You had some litigation; a suit was filed?

A. Yes.

Q. In the federal court?      A. Yes.

Mr. ARMSTRONG.—If the Court please, might I ask at this time, although I tried this case, that is the first I have known of it—might I ask permission, if it is found necessary, to offer all of the pleadings, and other files in that matter?

Mr. LINN.—I think it might be assumed that in 1922 there was litigation between the Greco brothers, over the ownership of the patent now in dispute. The San Jose Canning Company was operating under a license from Anthony Greco at that time, and Victor Greco claimed an interest in the patent, or claimed the ownership, and instituted a suit against Anthony Greco and Rancadore, and I believe obtained a sort of preliminary restraining order, which was subsequently dissolved, because Greco Brothers adjusted their difficulties, and the patent was then assigned to Louis Oneal.

The MASTER.—Does that stipulation suit you, Mr. Armstrong?

Mr. ARMSTRONG.—I think not. I think it will become necessary later on to introduce the file. I would like to examine the file later, and I simply ask permission to leave that open. I think Mr. Linn and I can stipulate. I am pretty good at stipulating.

(Testimony of I. Rancadore.)

Q. Mr. Rancadore, how much did you pay for the license that first year?     A. \$500.

Q. That was for the year 1922?

A. The year 1922.

Q. For the year 1923 did you take a license?

A. In 1923 we finally got together with Louis Oneal and Anthony Greco, and Victor Greco, and myself, in Louis Oneal's office, and, in fact, a contract was drawn then, for the same privilege, to pack asparagus style of string beans, at the price of \$500 a year. When Mr. Oneal had the papers all ready, or the contract ready, he called me up and I went up and got it, and had the president and secretary sign it, and then I went back to Mr. Oneal's office again, because he was the trustee, he told me that before he signed it, he wanted me to see Mr. Victor Greco; he said that Mr. Greco wanted to see me before he signed the contract. So at that time I had a patent pending at Washington for a mold, which was in dispute later, and was waiting for a patent on it, and the patent did not arrive until about August, 1923.

Q. When does the pack usually start?

A. The pack starts in July, and I had applied for a patent, I think it was somewhere in the year before, if I remember right, you have the record there, I don't remember exactly, but it was along there, so when I got to Mr. Greco's office in the cannery Mr. Greco told me that he would absolutely not agree to the signing of the papers by Mr. Oneal unless I assigned all of my right, title, and interest in the patent which was then pending.

Mr. ARMSTRONG.—This can be stipulated, I think, Mr. Linn. Rancadore's application was filed April 26, 1922, and the patent was issued August 14, 1923.

Mr. LINN.—I was about to interrupt to say I did not see the materiality of the testimony. What we are driving at this morning, as I understand it, is the art as it stood at the time of the infringement.

Mr. ARMSTRONG.—If the Master rules it is relevant, and is to be taken up later, it enters into the element of damages, the nature of the license, there would have to be another hearing. Would your Honor have it that way?

The MASTER.—Yes, I do not think it is material at this time.

Mr. ARMSTRONG.—The question of license, except so far as it necessarily went into the matter of having started some comparative basis, may be deferred until another hearing to be held at the call of the Master?

The MASTER.—I call the parties' attention to the fact that if I recall this case, under the order of reference, I am to find nothing but profits. The usual order is damages and profits; you take whichever is the larger.

Mr. ARMSTRONG.—That may have been the order. Under your Honor's order, which I only read Saturday, I take it at this time we are simply

(Testimony of I. Rancadore.)

to establish whether there was any foundation for any basis of comparison in the hand pack.

The MASTER.—Yes.

Mr. ARMSTRONG.—We will let that stand, then.

Mr. LINN.—Yes.

Mr. ARMSTRONG.—Q. Mr. Rancadore, you did not take a license in 1923?     A. No.

Q. Nor in 1924?     A. No.

Q. During those two years, did you use any molds?     A. We used my mold.

Q. Your patent having previously been granted?     A. Yes.

Q. When you say “my mold,” you mean the mold that was offered in evidence in this case which is now pending?     A. Yes.

Q. Then in 1925 what did you do?

A. As soon as we found out we could pack asparagus style string beans by any other method except the method of the mold similar to the Greco mold, we immediately went back to the hand pack, which we have continued ever since.

Q. You started that in the season of 1925?

A. Yes.

Q. While the suit was still pending?

A. Yes, it was pending, but the decision was already given, and at that time we took an appeal, and the appellate court decided that the claim—

The MASTER.—We know all about that.

Mr. ARMSTRONG.—Q. That suit was pending?

A. Yes.



(Testimony of I. Rancadore.)

Q. You went back to your form of mold that you experimented with in 1922?

A. Yes, this is the one we have been using.

Q. Will you explain the difference between the two molds?

A. We saw that when you cut the beans this way, the beans do not rest on anything here, they are kind of limber, you do not make a clean cut on the bottom, so we extended the wood part here so that all the beans rested on it, and when you cut you would make a clean cut.

Q. The beans, before they had been put in the mold, had been blanched?      A. Yes.

Q. That was the mold that you had in 1923?

A. 1925, 1926, and 1927.

Q. It was upon the use of that mold in those years that you based the statement which you have filed with this Court, and which you swore to on the 14th of October, 1926, as to comparative cost?

A. Yes.

Mr. ARMSTRONG.—I wish to introduce in evidence the shorter one of these two models as Defendant's Exhibit 1, and the longer one as Defendant's Exhibit 2.

The MASTER.—They will be so received and marked.

(The models were marked Defendant's Exhibits 1 and 2.)

Mr. ARMSTRONG.—That is all.

(Testimony of I. Rancadore.)

Cross-examination.

Mr. LINN.—Q. Mr. Rancadore, you first packed under the Greco patent in the year 1922: Is that correct?     A. Yes.

Q. That was under a license by Anthony Greco?  
A. Yes.

Q. That was the first time you had ever packed string beans in the so-called asparagus style?

A. I could have done it before that.

Q. But you did not do it?     A. I did not do it.

Q. You had never done it before?

A. No, on account of the threat that I could not do it and they would sue us.

Q. Did you have any talk with Victor Greco prior to the year 1922, at all, with reference to the packing of string beans?

A. I do not recall it if I did.

Q. When did you enter the business of packing string beans?     A. In 1919.

Q. In 1919, 1920, and 1921 you packed string beans?     A. In 1921 we did not pack.

Q. You did not pack, at all, in 1921?

A. We did not pack, at all, in 1921, no.

Q. In 1919 and 1920 you packed string beans?

A. Yes.

Q. Describe the method of packing those string beans in those two years.     A. Cut string beans.

Q. What do you mean by that, describe the method?

A. The beans were taken when they came in from

(Testimony of I. Rancadore.)

the ranches and the women were stripping them off and tipping the ends, and then they are cut in an inch or an inch and a half lengths, and put in the can after they are blanched. We packed in 1919 whole string beans in cans.

Q. You did?

A. Yes, not asparagus style, but whole string beans.

Q. Whole string beans?

A. Yes, put them in the cans any old way, not packed asparagus style.

Q. But put in the can any way?      A. Yes.

Q. A smaller bean, was it?

A. Yes, and big beans, of a fancy quality.

Q. Did you keep any books to show comparison of the cost between packing them that way and packing them cut, or packing them with the Greco mold, as you did in 1923?

A. No, I did not, I did not keep any record.

Mr. ARMSTRONG.—Q. Have you any record of the year when you packed them whole?

A. You mean the first year?

Q. I mean when you packed them whole in cans. Have you any record of what the costs were?

A. I don't remember what we did pay, but I think it was some 3 cents a tray, or 4 cents a tray.

Q. A tray consists of what?      A. Of 19 cans.

Mr. LINN.—Q. Have you any comparison that would show the difference in the cost of packing them whole in 1922 and packing them whole under the Greco mold, as you did in 1923?

(Testimony of I. Rancadore.)

A. Well, for the asparagus style pack we paid 20 cents a tray, packing them in asparagus style; cutting beans, that is very easy work, and it is only 11½ or 2 cents a tray.

Q. Have you any record to show what you paid for packing them whole in 1920?

A. Well, the whole beans is altogether different than the asparagus style.

Q. I mean have you got any record that would show? A. No record.

Q. No record of any kind? A. Yes.

Mr. ARMSTRONG.—Q. Wouldn't the books show the cost of that that year?

A. We used a workmen's card, that is all we generally did, for the cost, and after one or two years that was destroyed.

Mr. LINN.—Q. You knew that the Grecos were canning beans asparagus style in 1919, did you not?

A. Yes.

Q. And you knew it in 1920? A. Yes.

Q. You did not pack any in 1921? A. No.

Mr. ARMSTRONG.—I object to the question, because anybody could pack asparagus style beans in 1919.

Mr. LINN.—This is just preliminary.

Mr. ARMSTRONG.—It may be preliminary, if you are going to connect it up; otherwise, my objection goes. Could we have a ruling on it?

The MASTER.—Read the question.

(The record was here read by the reporter.)

Mr. ARMSTRONG.—I will change my objection



(Testimony of I. Rancadore.)

to a motion to strike out; it is not within the purview of this trial, here.

Mr. LINN.—It is just preliminary, as showing the state of the art.

The MASTER.—I will overrule the motion.

Mr. ARMSTRONG.—Exception.

Mr. LINN.—Q. Mr. Rancadore, did you know of anyone who canned beans asparagus style without the use of the Greco mold prior to the year 1923?

Mr. ARMSTRONG.—I object to that as irrelevant and immaterial.

The MASTER.—Overruled.

Mr. ARMSTRONG.—Exception.

A. I don't know what the other canners were doing; probably somebody was packing asparagus style string beans; I understood that somebody in the east were canning asparagus style string beans.

Mr. LINN.—Q. Who did you understand were packing asparagus style string beans in the east?

A. I don't know who the canners were, but there was some rumor that other people were putting it out. I don't know that as a fact.

Q. You were in the canning business rather extensively?

A. Not extensively, a small plant.

Q. Don't you consider market conditions and go into them, necessarily?

A. Market conditions, yes.

Q. You know what product was being marketed at that time in the United States?

(Testimony of I. Rancadore.)

A. I did not.

Q. You don't know, then, of anyone who was canning beans asparagus style without the use of the Greco mold in the year 1923?

A. I don't know for a fact, no.

Q. In the year 1922, the season of 1922, did you pack string beans asparagus style?     A. Yes.

Q. With the use of the Greco mold?

A. I packed under a license from Anthony Greco.

Q. Give the date at which you obtained that license from Anthony Greco, or entered into negotiations with Anthony Greco for that license in 1922.

Mr. ARMSTRONG.—Which one do you want, the date he entered into negotiations?

Mr. LINN.—The date that he entered into negotiations.

A. I don't remember the exact date, I believe it was in the spring of 1922, long before the packing of string beans.

Q. You entered into negotiations with Anthony Greco for a license under his mold?     A. Yes.

Q. That was before the crop of string beans had been harvested?     A. Yes.

Q. When did you obtain that license?

A. That I don't remember the date of; I may have a record some place. It was before the packing of string beans.

Mr. ARMSTRONG.—Might I suggest that the plaintiff knows the date as well as the defendant

(Testimony of I. Rancadore.)

does, and he can probably give it, and we may stipulate as to it to save time.

Mr. ANTHONY GRECO.—It was in the spring of 1922.

Mr. LINN.—Q. Then you had a license under the Anthony Greco patent prior to the harvesting of the string beans in 1922? A. Yes.

Q. You did not start your experiment using Defendant's Exhibit No. 1, until after you had the assignment of the Anthony Greco patent?

A. What do you mean by "assignment"?

Q. The license.

A. It was during that pack, as soon as we started the pack.

Q. As soon as you started packing you started experimenting with this device or mold which is in evidence as Defendant's Exhibit No. 1?

A. Yes.

Q. At that time you were operating under the Greco license, were you not?

A. I was, but I did not expect to use this. I wanted to satisfy myself whether it could be done by hand, or not.

Mr. ARMSTRONG.—Q. Did you satisfy yourself?

A. Yes, absolutely.

Mr. LINN.—Q. Did you ever use that mold, Defendant's Exhibit No. 1, at all, in the year 1922?

A. Just about half a dozen cans.

Q. For about six cans? A. Yes.

Q. You discarded it then?

(Testimony of I. Rancadore.)

A. Yes, I did not intend to use it because I had a license to pack.

Q. At the same time you were experimenting on another mold?

A. I was experimenting to see if it could be done by hand.

Q. At the same time you were experimenting on another mold which experiments culminated in an application for a patent for a mold which is the infringing mold in this case: Is that true?

A. Yes. I did not pack with the mold of Anthony Greco, at all; I used my own mold during that year.

Q. During that year?

A. In 1922, I did not use his mold, at all although I had a license; I used my own mold, because I thought it worked easier than the other one.

Q. In 1922, you operated under a license from Anthony Greco? A. Of \$500, yes.

Q. And you used a mold which you, yourself, or someone in your employ, prepared, and which was subsequently offered for patent? A. Yes.

Mr. ARMSTRONG.—Q. And patent issued?

A. And patent issued.

Mr. LINN.—Q. And that was the mold which was the infringing device referred to in this case?

A. Yes.

Q. When, in the year 1922, did you use this device? A. In July, 1922.

Q. Defendant's Exhibit No. 1 in evidence.

A. In July, 1922.



(Testimony of I. Rancadore.)

Q. In July, 1922? A. Yes.

Q. You discarded it after packing about six cans? A. Yes.

Q. At that time did you in any way make any comparison of the cost of packing string beans with this mold Defendant's Exhibit No. 1, with the Greco device?

A. I did not, because it was not necessary.

Q. You did not? A. No.

Q. In 1922, or 1923, did you use either of the devices No. 1 or No. 2 in evidence?

A. No, I did not.

Q. In 1924 did you use either of the devices in evidence? A. Yes, I did.

Q. Which one? A. No. 2.

Q. You used No. 2? A. Yes.

Q. That is in the year 1924? A. 1925.

The MASTER.—How about 1924?

A. In 1924 I was working under my own mold; at the time the suit was still pending, I did not want to use this, on account of the threat of being sued, anyway, whether I packed them by hand, or not, so I thought I had better stay with my own mold, because of having a patent on it.

The MASTER.—Q. You began to use No. 2 there in 1925?

A. In 1925.

Mr. LINN.—Q. You did not experiment any further with mold No. 1? A. No.

Q. After 1922? A. No.

Q. You again took up the matter of experiment-

(Testimony of I. Rancadore.)

ing with the mold or device other than the Greco patent in the year 1925?

A. In 1925 we used the hand method.

Q. In the year 1925 you developed the mold in evidence as Exhibit No. 2?

A. I would not call that a mold, I would call that more a form to hold string beans.

Mr. ARMSTRONG.—He did not develop it.

A. It is not developed, it is the same thing, only I changed the size of the plates.

Mr. LINN.—Q. It is the same thing as the other, only different?

A. It is the same, only I changed the size of the plates.

Q. You found that No. 1 was impracticable?

A. No, I did not say it was impracticable—

Q. Just wait a minute. You found No. 1 was impracticable because the beans, you were not able to shear off the ends of the beans—

A. The bottom layer, that is all.

Q. (Continuing.) As well as could be done under the Greco patent?

A. No. I did not say any such thing.

Q. I say you found that to be the fact.

A. The Greco patent is the same way, there is nothing to hold them in the Greco patent, unless you put it over a block; there is nothing to hold the string beans in there, because the Greco patent is just a cylinder, without anything on the bottom to hold the string beans, when you cut them, unless you put it over a block.

(Testimony of I. Rancadore.)

Mr. ARMSTRONG.—Q. As far as cutting is concerned, it is better than the Greco patent?

A. Yes, it is better, because there is something to rest on.

Mr. LINN.—Q. You found No. 1, though, impracticable?

A. No; I could use that as well as the other.

Q. You could use that as well as the other?

A. Yes, absolutely.

Q. You found no advantage in the extension of the block beyond the upright in Exhibit No. 2?

A. No material advantage at all; you could do it just as well, but it is easier to do it.

Q. It makes a better pack than No. 2?

A. It has nothing to do with the pack; the cutting of the ends of the string beans has nothing to do with the pack.

Q. Doesn't it improve the appearance?

A. No.

Q. As to Exhibit No. 1 in evidence, the difficulty with that was that the uprights are not long enough? A. No, it is just the same as the other.

Q. When you shear off the ends of the beans, the bottom layer of beans, or the beans on the bottom, did not cut off as sharp as you think they should?

A. They do; occasionally, if the girl does not know how to handle the knife she would chew off the bottom layer on account of not having a bottom block, but you can make as clean a cut as with the other if you are careful, only it makes it easier for the girls to handle.

(Testimony of I. Rancadore.)

Q. But it insures a better product?

A. Not a better product, no.

Q. It does insure a better product, doesn't it?

A. It does not.

Q. The product is just as good with the bean broken off, the point of it?

A. I did not say broken off, at all. These forms have nothing to do with the product. If the product is good when you put them in a can it is good, but if they are bad this does not improve it.

Q. The beans are just as good, no matter which way it is?      A. Yes.

Q. But your product is more marketable if there is a clean cut in the can?

A. Naturally, they look better.

Q. They look better, the product is marketable to a greater extent?

A. They look better, of course.

Q. And they sell better?

A. That is the reason we had this long, in order to be sure that all of the beans was cut clean.

Q. In order to insure a produce that would be more marketable you developed Device No. 2 in evidence?

A. This could have been done in the same way I did with the first form in 1922.

Q. But it was not done?

A. Because I did not intend to use it; this was only for my own satisfaction, to see whether we could pack them, or not.

Q. Necessity developed No. 2 in 1925?



(Testimony of I. Rancadore.)

Mr. ARMSTRONG.—That calls for a conclusion.

The MASTER.—I think it is very clear. It is a conclusion.

Mr. LINN.—Q. You have never packed beans, then, at any time, except in the year 1920, exclusively by hand, without the use of any device?

A. What do you mean by 1920?

Q. You packed string beans whole?

A. In 1919.

Q. In 1919, was it?

A. 1920 and 1919, two years we packed without packing asparagus style; in 1921 we did not pack, at all.

Q. In 1920 you packed beans cut as you have described, and also packed some whole? A. Yes.

Q. Without the use of any device, at all?

A. We did not pack them asparagus style.

Q. But they were not packed asparagus style?

A. No.

Q. When you refer to “asparagus style” you mean in bunch form, standing erect in the can?

A. Yes. The only reason why I did not do it was because I did not want to get into a lawsuit on account of Greco claiming nobody could pack asparagus style string beans without getting permission from him, on account of his holding a patent.

Q. Then until the year 1925, with the exception of the six cans in the year 1922, you did not can string beans whole, or asparagus style, without the use of the Greco mold?

(Testimony of I. Rancadore.)

A. I never did use the Greco mold.

Q. Or your infringing device?

A. Yes, that is commercially. I packed in 1923, and 1924, I packed some whole to see that the work could be done all right, but I did not go into it extensively.

Q. In 1923 and 1924 you used No. 2?

A. I used No. 2, that is, not commercially, just to satisfy myself whether or not it could be done.

Q. And you satisfied yourself on No. 1 in 1922?

A. Yes, I wanted to get on it in order to see that it packed just as good as the other.

Q. With this device No. 2, string beans are placed in it by hand?

A. By hand, yes, the same as you do on the mold.

Q. The same as you do on the Greco mold?

A. Yes.

Q. You then shear off the protruding ends with a knife? A. Yes.

Q. The same as you do in the Greco mold?

A. Yes.

Q. Then you take the beans up by hand?

A. Yes.

Q. Out of the mold? A. Yes.

Q. Or out of this device? A. Yes.

Q. And insert them in the can? A. Yes.

Q. That is the way it is done?

A. Just the same as it is done in Greco, but of course you don't take it by hand by the Greco mold.

Q. No. 2 was never used commercially—

A. (Intg.) Until 1925.

(Testimony of I. Rancadore.)

Q. How many cans did you can with that mold in 1923 or 1924?

A. I don't remember, just a few cans, to see that it could be done all right, and we could pack them just as good as the other.

Q. Does it pack just as good as the other?

A. Yes.

Q. Have you got any samples?

A. I can get some very quickly.

Mr. LINN.—I suppose we might introduce in evidence cans of the different packs?

Mr. ARMSTRONG.—We will be very glad to submit them to the Master.

The MASTER.—What is the purpose of this mold No. 2?

A. It is to hold enough beans in the form to fit into a No. 2 can.

Q. It has two purposes, then, it is to measure the beans for the purpose of filling a No. 2 can?

A. Yes.

Q. And to cut off the ends?

A. Cut off the ends.

Q. That is, you cut off one end, don't you?

A. You cut off both ends. The girls last year found it easier by cutting off one end and putting it in the can and then cutting the other end after they put it in the can; they do it both ways, whichever is the easiest way they do.

Mr. LINN.—That is all.

Mr. ARMSTRONG.—I don't know whether it is necessary to bring out the fact, because it is self-

(Testimony of I. Rancadore.)

evident to the Court, that the looseness of the bars or uprights on the No. 1 mold, and perhaps on the No. 2, is simply due to shrinkage.

The MASTER.—Is this the identical mold, No. 1, that you used at the time?

A. It is the original mold.

Q. And those galvanized tacks were the ones that were originally there?

A. Yes. Of course, the board got smaller on account of shrinkage, and they got rather loose.

Mr. LINN.—Q. Is there anyone that you can name that assisted you in doing this?

A. Yes, two of them.

Q. Who were they?

A. One of them is Mr. Filice, and the other Mr. Cusimano.

Mr. ARMSTRONG.—Q. Mr. Rancadore, in departing from the use of your mold or the Greco mold and taking up the work of canning these beans in your factory under the mold which is marked Exhibit No. 2, that is, the long one, the difference in cost of packing is simply the difference in cost of putting the hand around the beans and putting them in the can, instead of sliding them in?

A. The girls can do it just as quick with this as with the mold; in fact they make more money with this than with the mold; we used to pay 19 cents a tray, and when we got started with this mold it cost 20 cents by this method, which is a cent more per tray of 19 cans.



(Testimony of I. Rancadore.)

Q. When you went back to the method of Exhibit No. 2, you had to pay an extra cent a tray?

A. We paid an extra cent for the girls to be satisfied, and we found they were making too much money, in fact, they were doing it faster by this method than by the mold, but we started at 20 cents and we did not want to reduce it, so we kept on paying 20 cents.

Q. So that, irrespective of whether the girls were entitled to it, or not, the difference in cost on account of handling it by hand was about a cent a tray?

A. A cent a tray.

Q. A tray, you said, consisted of 19 cans?

A. Yes.

TESTIMONY OF EUGENE J. FILICE, FOR  
DEFENDANT.

EUGENE J. FILICE, called for the defendant;  
sworn.

Mr. ARMSTRONG.—Q. Where do you reside?

A. 384 Willow Street, San Jose.

Q. What is your business?

A. I am connected with the San Jose Canning Company.

Q. How long have you been connected with the San Jose Canning Company?

A. I was with them in 1920, the season, and then the season of 1921 the plant did not run, and I went back to them in September of 1923.

(Testimony of Eugene J. Filice.)

Q. What was your position with the canning company in 1920?     A. Superintendent.

Q. You have been, except for the year 1921, superintendent ever since?

A. I have been superintendent since January 1, 1924.

Q. You went back to them as superintendent—you stated you went back in 1923.

A. Not in the capacity of superintendent; I was there as master mechanic from that time until the 1st of January, 1924.

Q. So that you were there in 1920?

A. I was there the season of 1920 to the spring of 1921.

Q. And then there was no pack that year?

A. There was no pack.

Q. And you left then?     A. Yes.

Q. Then you went back to the canning company when?     A. In September of 1923, September 28.

Q. September 28th?     A. Yes.

Q. During the time that you were out of their employ, were you about the establishment?

A. Occasionally.

Q. Were you there in the spring of 1922?

A. I was there in July of 1922.

Q. Did you see Mr. Rancadore, or anyone else, in the factory experimenting with any measures, or molds, or anything of that kind?     A. Yes.

Q. Are you the man he referred to in his testimony as the superintendent at that time?

A. Not at that time in 1922.

(Testimony of Eugene J. Filice.)

Q. But did you experiment with him on that?

A. Yes, I did experiment with him on this mold here, No. 1.

Q. Did you see Mr. Rancadore, or did you and Mr. Rancadore and others there pack beans in what is called the bunch or asparagus style in 1922?

A. Yes.

Q. And used that mold or measure, Defendant's Exhibit No. 1?      A. Yes.

Q. And, using that mold or measure, Defendant's Exhibit No. 1, you put them into that mold and then used your hands in putting them into the can: Is that the idea?      A. Yes.

Q. First cut them?

A. First cut them one end and then the other, and then take them with your hands and place them into the cans.

Q. Did you find that that could be worked with great facility?      A. Yes.

Q. It was done by way of experiment to find out whether you could do it by hand?      A. Yes.

Q. Then in 1923, did you have anything to do with experimenting in the same way of packing by hand?      A. I did not, not in 1923.

Q. You were not present when they tried out a few cans, using mold No. 2?      A. Not in 1923.

Q. In 1924, did you?

A. In 1924 I was there, I was superintending the plant then, and I made experiments during that time with Mr. Rancadore.

Q. What method of packing beans in the bunch

(Testimony of Eugene J. Filice.)

form or asparagus style was used in 1925, 1926, and 1927?     A. This mold No. 2.

Q. Indicating Defendant's Exhibit No. 2. Does the use of Defendant's Exhibit No. 2, that is that long mold, retard the work of packing beans in the bunch form or asparagus style?

A. No, it speeds it up, I believe.

Q. You think the girls are able to pack more?

A. They are packing more, the capacity of one woman is more now than it was with the mold form.

Q. Irrespective of that, she gets more money per tray than she did when she packed under the mold form?

A. There is more production, more cans turned out per day. Of course, they make more money, because they are running more cans.

Q. Were you there when they were using the Rancadore mold?

A. The year of 1924 they used that.

Mr. RANCADORE.—1922.

Mr. LINN.—We want this witness' testimony, not yours, Mr. Rancadore.

Mr. ARMSTRONG.—What is your best recollection? Any year that you were there were they using the Rancadore mold?

A. Well, in 1924 they used that.

Q. You are sure of it, 1924?     A. Yes.

Q. At that time you paid the girls less per tray than when you went back to No. 2?

A. One cent a tray less, 19 cents in the mold form and 20 cents in this.



(Testimony of Eugene J. Filice.)

Q. But your experience is in the last three years during which you used Defendant's Exhibit No. 2, it shows there is greater facility in pack, more pack per girl? A. Yes.

Q. Where did you work in the years 1922 and 1923 when you were not working for the San Jose Canning Company?

A. In the year 1921, on the 18th of September, I took a position with Mr. Victor Greco in his cannery.

Q. What position did you have there?

A. I was assistant superintendent.

Q. Did your duties require you to oversee the packing of beans asparagus style, with the so-called Greco mold?

A. I did not have anything to do with overseeing it; of course, naturally, I was around the plant and saw it done.

Q. Do you know what was being paid per tray for the work of packing?

A. From what I can recall of that it was, I believe, 25 cents per tray of 19 cans.

Q. What did Mr. Greco pay his girls for packing beans asparagus style?

A. 25 cents a tray of 19 cans.

Q. How long were you in the employ of Mr. Greco?

A. From the 18th of September, 1921, to the 18th of September, 1923.

Q. During all of that time was there any change in the price paid to the girls using that mold?

(Testimony of Eugene J. Filice.)

A. Not that I can remember, with the exception of 1923 there was a change made, and instead of having the women tip the beans and sort them, the canneries were running them without tipping, but to my recollection there was an advance made, but I cannot remember the price.

Q. Didn't the payment of that higher price make trouble between the girls or employees working in the two factories, one getting 25 cents a tray and the other 20 cents a tray, and using the same method?

A. Not a material difference—it was not noticeable; it did not come to our attention or notice.

Cross-examination.

Mr. LINN.—Q. Mr. Filice, you worked for Mr. Greco in the year 1922?

A. From September, 1921, to September 23, two years.

Q. You worked in Mr. Greco's plant while he was canning beans under the Greco patent? A. Yes.

Q. You saw that in use? A. Yes.

Q. And helped in the cannery during that season? A. Yes.

Q. As assistant superintendent? A. Yes.

Q. Then you went to Mr. Rancadore's cannery, the San Jose Canning Company, the defendant, here, on September 28, 1923? A. Yes.

The COURT.—Q. Are you still in his employ?

A. Yes.

(Testimony of Eugene J. Filice.)

Mr. LINN.—Q. You began work for Mr. Rancadore, then?

A. Yes.

Q. You were not superintendent at first?

A. Not until the 1st of January, 1924.

Q. Immediately upon entering the plant you started some experiments with this mold, No. 1?

A. No, not in 1923. That was after the string beans were packed, September 28, that was beyond their pack, it was tomato pack.

Q. Then when did you first start working on mold No. 1?

A. On this mold No. 1, in July of 1922.

Q. July, 1922? A. With this No. 1.

Q. Where were you then working?

A. I was working for Mr. Greco at that time. This experimenting took place one evening, late one evening.

Q. While you were still working for Mr. Greco?

A. Yes.

Q. You went over to the San Jose Canning Company? A. Yes.

Q. And worked on this No. 1 mold? A. Yes.

Q. It was evident at that time that asparagus-pack string beans were a success?

Mr. ARMSTRONG.—I object to that as calling for a conclusion of the witness.

Mr. LINN.—Let me finish the question.

Q. You were working with Mr. Greco on that pack and you went over in the evening to see Mr. Rancadore, and tried to work out something else?

(Testimony of Eugene J. Filice.)

The MASTER.—That is simply a comment on the evidence already in.

Mr. LINN.—I will withdraw the question.

Q. In 1922 you worked at night on this model No. 1?      A. Yes.

Q. And canned about six cans of string beans?

A. Yes, about six cans.

Q. At night?      A. Yes.

Q. Did you work nights in that plant?

A. I was not working there, I was called there on account of some difficulty they were having in the No. 10 gallon cans; they were having trouble with the bulging out of them after they were cooked; the gallon cans were not coming out perfect.

The MASTER.—Q. Now, just tell me what happened.

A. I was called over there by this Mr. Cusimano, who was assistant superintendent at the time, and who was taking care of this cooking, and on account of this difficulty he came and got advice from me while I was in the employ of Mr. Victor Greco, so I promised him I would be over that evening and help him out on it, and while I was there that evening looking over his difficulty in the No. 10 cans, this thing had been brought out, after I was there a while, and we tried the packing of string beans with this No. 1 mold.

Q. What was done?

A. Well, Mr. Rancadore, and Mr. Cusimano, and myself, we got some string beans, we blanched them, we put beans in this No. 1 form, here, we cut off one



(Testimony of Eugene J. Filice.)

end, and later the other, and then we got the beans by hand and placed the back part of this bunch into the can, first, and then applied the thumbs, in squeezing, got the front part started, and when that was done, with the aid of bouncing, we began pushing into the can, and we saw they would slide down into the can very conveniently.

Q. What did the beans look like after that?

A. They looked exactly like they would with the mold that we used, in fact they were better; you could get more in there; due to the mold being smaller in diameter than the can, you naturally could not get as many in with that as you could squeezing them by hand.

Mr. LINN.—Q. Is the object to get in as many beans in the can as possible?

A. Yes, you want to get in as many as possible to held them up.

Q. And make a good product?

A. If they fall apart that indicates they are packed loose, and if they stay together it is an indication that they are packed tight.

Q. That evening, when you went over to Mr. Rancadore's plant at the solicitation of Mr. Cusimano, you saw Mr. Rancadore, of course, and worked with him?     A. Yes.

Q. And at that time you knew there was litigation between Mr. Greco and the San Jose Canning Company over this very product?

Mr. ARMSTRONG.—There was not any such litigation, because they held a license in 1922.

(Testimony of Eugene J. Filice.)

Mr. LINN.—Let the witness answer.

Mr. ARMSTRONG.—I object to it, because it assumes a fact that is not true, not on the record, that in 1922 there was any litigation. He held a license in 1922, and the record shows it.

Mr. LINN.—There was litigation between Victor Greco—

Mr. ARMSTRONG.—You are changing the question.

The MASTER.—Reframe your question.

Mr. LINN.—Q. And at that time you knew there was litigation between Victor Greco and the San Jose Canning Company over this very product?

A. No. The way I understood it, Mr. Rancadore had obtained a license to pack, and there was no difficulty in 1922.

Q. You knew, did you not, at that time, that Mr. Victor Greco had filed a suit in the Federal Court, and, prior to that, a suit in the State Court at San Jose? A. No, I did not.

Q. One moment—to enjoin the canning of string beans asparagus style by Anthony Greco, and by the San Jose Canning Company, as a licensee of Anthony Greco? A. No, I did not.

Q. You never knew that?

A. I knew that Mr. Greco had a patent before that, and knew that Mr. Rancadore had a license to pack under that patent.

Q. You knew he had a license from Anthony Greco? A. Yes.

Q. And you knew that Anthony Greco and Vin-

(Testimony of Eugene J. Filice.)

cent Greco were in litigation over the ownership of that patent?     A. No, I did not know it.

Q. You did not know that?

A. I did not know that the brothers were in litigation about the patent.

Q. You did not know that?     A. No.

Q. Mr. Rancadore did not tell you that evening that he had been enjoined, or they were seeking an injunction, and had filed suit against him to keep him from packing under the license from Anthony Greco?

Mr. ARMSTRONG.—I would like to know the date when the first suit was filed by Anthony Greco against Victor Greco. Have you it there?

Mr. LINN.—I have not the exact date.

The MASTER.—Let the witness answer this question.

Mr. ARMSTRONG.—That is assuming something not in the record; that suit was not filed until long after this experimenting was conducted.

The MASTER.—I don't know that. I suppose the record is clear on it.

Mr. ARMSTRONG.—This goes to the credibility of the witness, and I ask permission to introduce both of these suits when we find out what they are.

The MASTER.—You can do that later.

Mr. ARMSTRONG.—May I reserve a motion to strike on all of these matters?

The MASTER.—Yes.

Mr. LINN.—Read the question.

(Last question repeated by the reporter.)

(Testimony of Eugene J. Filice.)

A. No.

Q. You never heard that at that time?      A. No.

Q. How many times did you go over to the San Jose Canning Company and assist in their plant, or in making experiments, while you were in the employ of the Greco Canning Company?

Mr. ARMSTRONG.—You mean over the whole three years?

Mr. LINN.—Yes; while you were in the employ of the Greco Canning Company, how many times did you go to the San Jose Canning Company?

A. I went in the latter part of July, 1922, when their experiment was made with the No. 1 in packing a few cans there, about six.

Q. Did you go at any other time?

A. Not until in 1924.

Q. Not until 1924?

A. That is, not helping on this. I had been in the plant, but not helping on this.

Q. How many times did you go to that plant while you were working for the Greco Canning Company?

A. That would be pretty hard to say; I was living close by there, I had been interested in the firm, and I would occasionally go in there for anything that I could help out on.

Q. About how often?

A. I would say probably four or five times. It might have run more than that, I can't remember.

Q. Was there any discussion at any of these times



(Testimony of Eugene J. Filice.)

with reference to this Model No. 1, except the one instance you have testified to?

A. Not until 1924.

Q. In 1924 you were working there?

A. Yes, I was working there.

Q. But in 1922 that was the only time while you were working for the Greco Canning Company that you discussed this matter with Mr. Rancadore?

A. Yes.

Q. Did he tell you why he was making this experiment with Model No. 1?

A. Yes, to satisfy himself that this pack could be made by hand without using the patent, or without paying for a license under that patent.

Q. He did not tell you that he was being threatened with litigation?      A. Not in 1922.

Q. In 1922 he did not mention that?      A. No.

Q. He did not mention that they had told him sometime prior to that that Victor Greco, at least, would sue him?

A. No. I knew he had a license in 1922.

Q. Didn't you know that at the same time he was working on a mold of his own?

A. Not in 1922.

Q. You didn't know that in 1922?

A. No, that was taken up amongst themselves.

Q. How do you know that?

A. Because they were using a mold that they had made that they had applied for a patent on.

Mr. ARMSTRONG. — It is self-evident they

(Testimony of Eugene J. Filice.)

would not ask an outside superintendent to help them out with a mold of their own.

The MASTER.—Let the witness do the testifying.

Mr. LINN.—Q. You knew they were working on a mold of their own, didn't you?

A. Yes, they were canning beans with that.

The MASTER.—Q. In 1922?

A. In 1922.

Mr. LINN.—Q. Then they were working on this one, here, that you have just testified to, No. 1?

A. Yes.

Q. You testified that it is more practical to use Exhibit No. 1 than it was to use the Greco mold?

A. I don't get that.

Q. You have testified that it is more practical to use Mold No. 1 than it is to use the Greco mold.

A. It is an advantage that you can get more beans into a can.

Q. And do it easier and quicker?

A. It proved that way.

Q. To remove the beans from that block in both hands, press the hands together at the bottom, and insert the beans in the can, and then force them down by hand? A. Yes.

Q. That it is easier and more practical than the Greco mold?

A. Yes. The actual work has proved it now in the last two years.

Q. The Greco mold is the two half cylinders with a hinge, and a flange, and the lock? A. Yes.

(Testimony of Eugene J. Filice.)

Q. Which is inserted over the can and by a jar precipitates the beans?

A. By the end of a form going over the beans to go into the can they have got the work of one more additional tool.

Q. That is, they do that in the Rancadore?

A. Yes, with their mold, the same as Victor Greco with his mold.

Q. Have you discovered in stringing the beans, or cutting off the ends of these beans on this mold No. 1, using this mold No. 1, that sometimes the beans on the bottom layer would be kind of chewed off rather than cut off straight?

A. No, not unless you would have a dull knife.

Q. As far as you are concerned, that never happened? A. No, they were cut clean.

Mr. ARMSTRONG.—Q. You are referring to mold No. 1?

A. I am referring to mold No. 1.

Mr. LINN.—Q. Were these uprights stiffer in 1922?

A. Yes. That block, evidently, had been a little green or damp, so that those tacks driven at that time held it tight, but during the years that have passed that has dried out so that it has shrunk, and naturally makes those prongs loose.

Q. The bean is damp when it comes from the blancher? A. In some cases.

Q. Isn't it quite damp?

A. Yes, but not enough for the water to flow; but it is damp.

(Testimony of Eugene J. Filice.)

Q. You are interested in the San Jose Cannery, the defendant, here?     A. I am now.

Q. When did you become interested?

A. In 1924.

Q. Were you interested in 1921?

A. I was interested in 1920, and in 1921.

Q. In the San Jose Canning Company?

A. Yes.

The MASTER.—Q. What is the defendant, a corporation?

A. A corporation.

Q. And it was then?     A. Yes.

Q. Do you hold stock in it?

A. I held stock in it in 1920 and in 1921, and then, due to some losses we had, we liquidated that, we did not go broke, but we lost what we had in it, and I was out until I bought stock in 1924.

Mr. LINN.—Q. When you went back to work for the San Jose Canning Company on September 28, 1923, no experiments were made with any mold at that time?

A. In 1923?

Q. Yes.

A. No, it was after the season; we did not have any more beans on that date.

Q. When do you start packing string beans?

A. Generally along the 20th to the 25th of July.

Q. You pack them until what time?

A. What year?

Q. At what time of any year?



(Testimony of Eugene J. Filice.)

A. We will usually run a few days in July, August, and a few days in September.

Q. A few days in July, and a few days in September?     A. Yes.

Q. And all of August?     A. Yes.

Q. When did you start your experiments on mold No. 2?     A. In 1924.

Q. What time of the year?

A. Well, along in July, the latter part of July.

Q. The latter part of July?

A. Yes, the first few days after we got started.

Q. Why did they extend the block beyond the up-rights?

A. No particular reason, but I made these prongs, myself, later, and instead of making them shorter I began to make them longer. No particular reason.

Q. There was no particular reason for it?

A. No, no particular reason, I just happened to make them longer.

Q. You have been making them longer ever since?

A. All of the forms I am using are of this length.

Q. No reason for it, at all?

A. No reason for it at all.

Q. You started your experimenting in July and August, 1924?     A. In July, 1924.

Q. You knew, then, as a result of those experiments, or, rather, as a result of the experiments with this mold No. 1, that beans could be successfully canned asparagus style?     A. Yes.

(Testimony of Eugene J. Filice.)

Q. Without the use of the Greco patent?

A. Yes.

Q. You knew that?      A. Yes.

Q. And it could be done cheaper?

A. At the time I did not know it could be done cheaper. As a matter of fact, it proved so.

Q. You did know in 1924 that it could be done cheaper?

A. I knew it in 1924. We did not go commercially into it in 1924.

Q. You knew in 1925 it could be done?

A. Yes.

Q. However, despite the fact that you knew in the year 1925 it could be done cheaper, you continued to pack under the Greco mold in the year 1925?

A. No, we did not. We packed with this mold in the year 1925.

The MASTER.—Q. No. 2?

A. No. 2.

Mr. LINN.—Q. In the year 1925?

A. Yes.

Q. Do you know as a fact that the decree of the District Court finally enjoining the use of the Greco mold was not signed until June 23, 1925?

Mr. ARMSTRONG.—Objected to as the record is the best proof of when it was signed.

The MASTER.—He wants the witness' knowledge. The objection is overruled.

Mr. ARMSTRONG.—Exception.

A. That I don't remember.

(Testimony of Eugene J. Filice.)

Mr. LINN.—Q. You were interested in the San Jose Cannery, weren't you?

A. Yes, I was interested in the cannery, but I don't just remember that particular thing.

Q. You knew that litigation was pending?

A. Yes.

Q. You knew that it had been decided against the corporation on the 23d of June, or some time during June, 1925?

A. That our mold was an infringement on the Greco?

Q. Yes.      A. Yes, I knew that.

Q. And you knew at that time that it was cheaper to use device No. 2?      A. In June, 1925?

Q. Yes.

A. How could we? We were not packing. I told you it was 1925, during the pack, that I found out it has been cheaper. I naturally could not find out before I run it.

Q. You packed in 1925 by that?      A. Yes.

Q. As far as you are concerned, as superintendent of the plant, there is no advantage in the use of device No. 2 in evidence over device No. 1?

A. No.

Q. None, at all?      A. No.

Q. In the Greco mold, there is a uniformity of size of the pack, is there not?

A. In what respect?

Q. Well, that the number of amount of beans that would be contained in the mold, that can be

(Testimony of Eugene J. Filice.)

contained in the mold is constant, the same every time?     A. Yes.

Q. In this device, either No. 1 or No. 2 in evidence, it will vary with the individual who is using it, the size of the hand, and the inclination of the person who is using either device No. 1 or No. 2 in evidence?

A. No, these forms are all exactly alike; they get the beans in there, probably within one or two beans difference, but these beans may vary in size, so that the amount would be the same, but if they tried to press more in the can they naturally couldn't do it, but they put in as many as possibly would go, and, therefore, there is bound to be very near a uniform fill in the cans.

Mr. LINN.—I think it might help the Master if we both stipulate that we will produce a sample of the Greco and then one of the defendant's.

Mr. ARMSTRONG.—The Court has already passed on this, unless the Master wants it.

Mr. LINN.—Just to look at them.

Mr. ARMSTRONG.—If the Master wants it I am perfectly willing, but the Court has already passed on it. I will stipulate that we can go out in the market and buy a few cans of the Greco and of the San Jose Canning Company and put them in.

Mr. LINN.—We will do that. That is all.

#### Redirect Examination.

Mr. ARMSTRONG.—Q. Mr. Filice, when you went over to the San Jose Canning Company on that



(Testimony of Eugene J. Filice.)

evening in 1922, when this experimenting with Exhibit 1 was had, you did not go over there for the purpose of taking part in any such experiment, did you?

A. No, I went over there for the purpose of helping in a difficulty with the No. 10 can.

Q. You did not?      A. No.

Q. Did you know they were going to bring up anything like that?      A. No.

Q. Is it customary among the canners canning the same product, among superintendents, to get together and discuss the various methods of handling the product, and business methods?

A. In some respects.

Q. You, canners, talk together over your difficulties and troubles?      A. Yes.

Q. And in a matter like this, where a patent is involved, you are perfectly free with your devices to each other, about cooking and packing, are you not?      A. Yes.

Q. There is nothing wrong about that?

A. No, nothing at all.

Q. And during the time that you were employed by Greco you had no interest in the San Jose Canning Company?      A. No interest.

Q. You had lost your interest?      A. Yes.

Q. They had gone out of business, practically?

A. Yes, I was there on occasions, I had some money coming from the firm, and at times I would go there for interest; that was what brought me

(Testimony of Eugene J. Filice.)

there at times for the interest in money I had coming.

Q. You did not make that first mold No. 1?

A. No.

Q. They had that there when you got there?

A. They had it there.

Q. After you discussed the question of cooking the gallon cans with them, they brought this out and showed it to you?      A. Yes.

Q. You saw them working with it?

A. I saw them working with it.

Q. You did not consider that you were doing anything disloyal to the Grecos in doing that?

Mr. LINN.—We will stipulate that his answer is “No.”

Mr. ARMSTRONG.—Q. You were asked a question here about the number of beans that went into a can, whether the same amount would not always be put in by the mold. You did not mean the same amount in number of beans?

A. No, not the same amount in number of beans, the same amount in quantity; the number of beans will vary; beans vary in size, and, naturally, you would have more or less.

Q. The number of beans in a can depends, of course, on the size of the beans, themselves?

A. Yes.

Q. And as to quantity, don't different canners pass looser than others?

A. Do you mean different canners pack looser than others?

(Testimony of Eugene J. Filice.)

Q. Yes.

A. I imagine our pack is a little bit tighter.

Q. But you have been in the trade for quite a while?     A. Yes.

Q. And you are familiar with the pack of different packers, in the lines that you pack, beans, tomatoes, and things like that?     A. Yes.

Q. And you know that some packers pack a little looser, pack a lesser amount of products than others?

A. Yes. The only beans I have seen packed asparagus style is what we pack and the Greco Canning Company.

Q. And from your experience in both factories, do you think that you pack a little tighter than the Greco?     A. A little tighter.

Mr. ARMSTRONG.—That is all.

Mr. LINN.—No further questions.

TESTIMONY OF MATTEO CUSIMANO, FOR  
DEFENDANT.

MATTEO CUSIMANO, called for the defendant,  
sworn.

Mr. ARMSTRONG.—Q. Where do you live, Mr. Cusimano?

A. 1045 Vine Street, San Jose.

The MASTER.—Be careful and do not lead the witness. The examination of the last witness was hurt a little bit by that.

(Testimony of Matteo Cusimano.)

Mr. ARMSTRONG.—I was simply trying to hasten along.

Q. Mr. Cusimano, in the year 1922, what was your occupation?

A. I was a mechanic and assistant superintendent in the San Jose Canning Company.

Q. When did you first see that block, there, indicating Defendant's Exhibit No. 1.

A. You mean when I saw that?

Q. When did you first see it.      A. I made that.

Q. When did you make that?

A. The latter part of July, I couldn't tell exactly.

Q. What year?      A. In 1922.

Q. For what purpose was that made?

A. The form like that was made to get the quantity of the beans, I understand.

Q. You made that to get the quantity of the beans?      The quantity of the beans.

Q. How were the beans to be packed, in what way?      A. Asparagus style.

The MASTER.—Q. Who told you to make that?

A. Mr. Rancadore said that he would like to have something of this kind to see how it would work, and I worked it out the best I could. I bent up a couple of pieces of iron.

Mr. ARMSTRONG.—Q. Did you see them trying to pack beans, using that mold?      A. Yes.

Q. When was that done?

A. That was that same evening that I had made that.



(Testimony of Matteo Cusimano.)

Q. Did they pack any beans from that mold into cans?     A. They packed a few cans, yes.

Q. How did it work? Were they able to pack?

A. It was satisfactory, as far as I understand from Mr. Rancadore.

Q. They had to lift the beans out of the mold and put them into the can?     A. Yes.

Q. Did they make a good, solid pack?

A. They filled in pretty good.

Q. How about the cutting of the beans. The beans have to be cut, don't they?     A. Yes.

Q. How about the cutting of the ends on that No. 1 mold, that one, there, that you made?

A. The only difficulty is when the knife is dull. If the knife is good and sharp it cuts every one. In fact, we had no trouble at that time.

Q. Were you employed continuously from 1922 on by the San Jose Canning Company?

A. Practically, yes.

Q. Are you employed by them now?     A. Yes.

Q. In 1922, were you familiar with the method of packing beans in bunch form, asparagus style?

A. No, that is, not in asparagus style.

Q. You are not familiar with the canning?

A. No.

Q. Do you know how the San Jose Canning Company packed them in those years?

A. The way they packed, when I had work in there and saw, there was no mold used in those years.

(Testimony of Matteo Cusimano.)

Q. But when they packed them in 1922, do you know how they packed?

A. When I went in in 1922, when they started in in July, I found this mold, and it was already prepared to be used for the asparagus style of beans, so we did start out and we worked a few days, a week or so, I wouldn't say any more, and that was the time, I made this, and we tried it out.

Q. You got it out and you packed the beans with it?     A. Yes, tried it out.

Q. Have you ever seen that mold No. 2 there?

A. Yes.

Q. Defendant's Exhibit No. 2?     A. Yes.

Q. When did you first see that?

A. The No. 2, I don't remember exactly, but I think it was in 1924; if I don't mistake it was in 1924. I seen Mr. Filice trying it out.

Q. In that year they used quite a few of these, did they?     A. Just experimented in 1924.

Q. How about 1925?

A. In 1925 they began using them.

Q. And 1926?

A. The same thing, they used this method ever since.

Q. In 1927?     A. Ever since.

Q. No more molds?     A. No more molds.

Q. Were you familiar with the mold that is referred to as the Greco mold?     A. Yes.

Q. Did you ever see it around the factory?

A. Yes.

(Testimony of Matteo Cusimano.)

Q. Were you familiar with the mold that Mr. Rancadore got the patent on?

A. Well, I don't really know what mold Mr. Greco had, I don't know exactly, but I know exactly what we had there; I don't know Mr. Greco's mold, I am not familiar with it.

Q. Do you remember the night that you experimented with the canning with your No. 1 mold, who was there when you made that experimenting?

A. There was present me and Mr. Rancadore, and a little later Mr. Filice. I had called him.

Q. What did you call him for?

A. I had a little trouble not exactly trouble, but I was not satisfied with the cook of the No. 10 cans, what they call gallons, I did not feel safe on it, the tins would not come back in proper shape, they bulged up on the lid, so I didn't feel safe, and I asked the superintendent, there, and he told me then he had no experience whatever in that, and I told him I wanted to see Mr. Filice, if he didn't mind. I says, "I am going to ask him about this," and one day I went over there and asked him to come and see what was wrong, I told him just what it was, and he said, "I will come down and see you and help you out," and when he came down, at the same time we were trying this little thing out.

Q. You did not call him over there for the purpose of having him look at it?      A. No.

Q. Did he make any particular date with you to come and give you advice about the bulging of the No. 10 cans?

(Testimony of Matteo Cusimano.)

A. Yes, he told me he will come in soon, if he saw lights in the cannery he would come in. He said, "I may come in pretty late, you may be home when I come in, but if I see lights I will come tomorrow night."

Q. Was there any particular time set that he would come in?      A. No, no particular time.

Cross-examination.

Mr. LINN.—Q. Mr. Cusimano, it was in July, 1922, that the first suggestion to make this mold was made by Rancadore?

A. Yes, he asked me to make it.

Q. He asked you to make it?      A. Yes.

Q. He was canning string beans then asparagus style?      A. Yes.

Q. With the use of a mold?      A. A mold.

Mr. LINN.—I think it will be stipulated, Mr. Armstrong, that that was the mold that Mr. Rancadore attempted to have patented, or did have patented.

Mr. ARMSTRONG.—You are talking about 1922?

Mr. LINN.—Yes.

Mr. ARMSTRONG.—Yes.

Mr. LINN.—And at that time you will also admit that he had a license from Anthony Greco for the use of the Greco mold?

Mr. ARMSTRONG.—Yes, I will admit that, although I do not believe it is relevant, and I will object to its being considered.



(Testimony of Matteo Cusimano.)

Mr. LINN.—Q. At that time, in July, 1922, what part of the month of July did this meeting take place?

A. Just about the end of July. I don't know the exact date.

Q. How long did it take you to prepare this mold?

A. It didn't take me long, I should judge about 30 minutes.

Q. About 30 minutes? A. Yes.

Q. Did you make it that night in July, or did you make it during the afternoon?

A. I made it in the evening.

Q. After Mr. Filice had arrived there?

A. No, I made it before. Mr. Filice came after I had everything made up, and was just about ready to try it when he came in.

Q. You knew that Mr. Filice was probably going to be there that evening if you stayed there late enough? A. I didn't expect him sure.

Q. What time of the evening was it?

A. It must have been pretty late.

Q. How late?

A. I should say maybe around ten o'clock, probably.

Q. Ten o'clock, in San Jose?

A. Not exactly that, around that time; that is pretty late.

Q. When Mr. Filice came was Mr. Rancadore there already?

A. Mr. Rancadore was there already with me.

(Testimony of Matteo Cusimano.)

Q. You had already been canning string beans asparagus style with this other mold?

A. With the other mold.

Q. Did Mr. Rancadore tell you why he wanted this mold made, No. 1, I am referring to?

A. Not exactly. He asked me if I could rig up something that would be reasonably good enough to use in place of this mold, and I rigged it up in a few minutes' time, and I didn't pay any particular attention to it.

Q. Did he tell you at that time that the Greco Canning Company had sued him because he was using the mold that he was using. A. No.

Q. He did not tell you that? A. No.

Q. You never heard of that at that time?

A. I never heard a thing about it.

Q. You canned how many cans of string beans?

A. Probably half a dozen or eight, no more.

Q. Have a dozen or eight cans?

A. Yes, no more.

Q. What did you do with them?

A. Destroyed them.

Q. You destroyed them? A. Yes.

Q. Then nothing was said again until November 24 about this mold? A. No more.

Q. What happened in 1924, if you know?

Mr. ARMSTRONG.—About what?

Mr. LINN.—About this mold.

A. About this mold, I don't know what it was, but I think I saw Mr Filice one day practicing himself; I am always busy in the cannery, it is like

(Testimony of Matteo Cusimano.)

running an airplane, one thing and another goes wrong, and I didn't pay attention exactly.

Q. About what time of the year 1924?

A. Well, probably the beginning of August, or so, I don't know exactly.

Q. About the beginning of August?

A. I couldn't say. I was very busy, and I didn't see what he was doing, I didn't pay any attention.

Q. About the beginning of August, you say?

A. I should think so, but I am not sure.

Q. The latter part of July, possibly, then?

A. Possibly; I could not exactly tell you the date.

Q. Was it the beginning of the canning season?

A. Not very far from it.

Q. Just around the beginning of the canning season? A. Yes.

Q. You saw Mr. Filice working on this model, too?

A. I don't know what he was doing, but I saw him practicing, and I didn't stop to pay attention, because I had no time.

Q. What was your position in 1924?

A. Mechanic and assistant superintendent.

Q. Didn't you bend the iron bars there for the second model? A. Not on the second one.

Q. Who would do that in the plant, if not you?

A. If I had no time they would give them out to have them bent. I don't know whether Mr. Filice bent them.

Q. It happened sometime in the latter part of July, or early August?

(Testimony of Matteo Cusimano.)

A. Yes, some time in the latter part of July or the first of August that I saw him practicing.

Q. Did you have any conversation with Mr. Felice or Mr. Rancadore at that time about it?

A. None, whatever.

Q. Did you ever see them used in the plant at that time?

A. Just for practicing, that is all I noticed, very little.

Q. A very, very little?      A. Very little.

Q. Maybe another half a dozen cans?

A. I couldn't say exactly.

Mr. LINN.—Will it be stipulated at this time, for the purpose of the record, Mr. Armstrong, that the order to show cause in this case now under consideration was issued on July 18, 1924?

Mr. ARMSTRONG.—If you have the record there I will look at it and stipulate. I won't stipulate to anything but what is in the record.

Mr. LINN.—I will show you the record, it was returnable on the 24th of July, 1924

Mr. ARMSTRONG.—You will remember I don't know anything about the record, because I did not come into the case until it was ready to try.

The MASTER.—That is the record in this case?

Mr. LINN.—Yes.

The MASTER.—You do not need to stipulate. I can refer to it.

Mr. LINN.—And that a temporary restraining order was issued on the 2d of August, 1924, which



(Testimony of Matteo Cusimano.)

was held in abeyance by a bond filed on August 2, 1924.

Mr. ARMSTRONG.—That is when I first came into the case, and I will stipulate to that.

Mr. LINN.—Did you know about this litigation, or did Mr. Rancadore say anything to you about him being sued in July or August, 1924?     A. No.

Q. He did not say to you that it might be possible that he would have to abandon the use of the mold that he was using and use something else?

A. He did not tell me anything.

Q. He did not say anything about it?     A. No.

Q. At the time that you had the meeting with Mr. Filice and Mr. Rancadore that evening, did they tell you that at that time suit was started, and it was quite likely they would have to abandon the mold?     A. No.

Q. Did you have any experience in packing, at all, Mr. Cusimano, or are you just a mechanic?

A. Well, naturally, I am around the cannery all the time, and I see a little of everything.

Q. You take that mold No. 1 in your hand; if a girl has a knife and is going to cut off the end of the beans—

Mr. ARMSTRONG.—Do you think you have qualified him as an expert?

Mr. LINN.—Do you want to withdraw him as an expert?

Mr. ARMSTRONG.—I put him on as a fact witness.

(Testimony of Matteo Cusimano.)

Mr. LINN.—Q. You know how these beans are canned?

A. I have seen them canned.

Q. Sometimes you canned them?

A. Not exactly.

Q. You have been around a cannery how many years? A. Since 1919.

Q. How many years before that in the cannery business? A. That is the beginning.

Mr. LINN.—Do you consider him qualified, Mr. Armstrong?

Mr. ARMSTRONG.—I do not yet.

The MASTER.—You have not got any question. Ask your question.

Mr. LINN.—Q. Mr. Cusimano, when a girl is using that model No. 1—

Mr. ARMSTRONG.—Ask him whether he ever saw a girl use it.

Mr. LINN.—Q. When a girl is using that model No. 1, that is in evidence—

Mr. ARMSTRONG.—We have nothing in the record, as far as this record is concerned, that a girl ever used it.

The MASTER.—Ask your question, and let the objection be made after the question is asked.

Mr. LINN.—Q. If a girl is using that model No. 1 and she uses a knife, as she will have to to cut off the end of the beans, is it not possible and probable that some of these beans will be kind of chewed off at the end, rather than cut nice and straight?

(Testimony of Matteo Cusimano.)

Mr. ARMSTRONG.—I object to this question on the ground it calls for the conclusion of the witness, second no foundation is laid, third, that it is purely a hypothetical question, and that the witness is not qualified as an expert.

The MASTER.—Overruled.

Mr. ARMSTRONG.—And it is immaterial, irrelevant, and incompetent for those reasons. Exception.

A. Not if careful.

Mr. LINN.—Q. Not if careful, but in your experience in canneries you found that girls are not always careful, isn't that true?

Mr. ARMSTRONG.—Objected to as calling for the conclusion of the witness.

The MASTER.—Overruled.

Mr. ARMSTRONG.—Exception.

A. They have to be carefully watched. I really don't know what you have got there, I never tried it. The only thing that I tried was that evening.

Mr. LINN.—Q. Well, take No. 2, a girl using model No. 2, with a knife to cut off the ends of the beans, she doesn't have to be so careful, does she?

A. I should judge it will cut clean this way and probably the other way. I would not swear.

Q. Probably it will, and possibly it won't: Is that what you mean?

A. I don't say possibly it won't, but if I have a sharp knife it cuts it.

Q. You are a practical mechanic, aren't you?

(Testimony of Matteo Cusimano.)

The MASTER.—I can judge as well about that as another witness, I think.

Mr. LINN.—Q. Are you financially interested in the San Jose Canning Company?

A. No.

Q. You just work for them?      A. Yes.

Redirect Examination.

Mr. ARMSTRONG.—Q. I think you said, when I first questioned you about the year—what year did you first see that model No. 2, Exhibit No. 2?

A. I should judge that was in 1924.

Q. You are quite positive you did not see it in 1923?

A. I am not sure, I couldn't swear to it.

Q. You are not sure whether 1924 was the first time you saw it, or not?      A. No. 2?

Q. Yes.

A. It must have been I saw it in 1924—maybe it was in 1923, also.

Q. I do not mean when they started to use it altogether, but when it was first made.

A. When it was first made, of course, this was 1922, but tried later, I am not exactly sure.

Q. But it might have been used considerably in 1923 and you not know it?      A. Probably.

Mr. ARMSTRONG.—That is all of our testimony.



TESTIMONY OF VICTOR GRECO, FOR  
PLAINTIFF.

VICTOR GRECO, called for the plaintiff,  
sworn.

Mr. LINN.—Q. What is your full name?

A. Victor V. Greco.

Q. You reside in San Jose? A. Yes.

Q. What is your business?

A. President and general manager of the Greco  
Canning Company.

Q. How long have you maintained that position  
in the cannery in San Jose?

A. General manager since 1913; president and  
general manager since 1917.

Q. Mr. Greco, you are familiar with the canning  
of string beans? A. I am.

Q. How long have you been familiar with the  
canning of string beans? A. Since 1913.

Q. When did you first start canning string beans  
asparagus style by use of the Greco patent, or any  
other method? A. During the season of 1916.

Q. Did you continue to so pack beans for some  
time from that time? A. Yes.

Q. Prior to the year 1922, do you know whether  
or not beans were canned by any other person, firm,  
or corporation, other than the Greco Canning Com-  
pany? A. No one else packed them.

Q. Asparagus style? A. Asparagus style.

Q. Are you familiar with the canned vegetable  
market? A. Very much so.

(Testimony of Victor Greco.)

Q. You are familiar with the products that are marketed?     A. I am.

Q. You have visited brokers in New York, Chicago, and other places?     A. I have.

Q. In an effort to sell your own products?

A. I have.

Q. Have you ever seen on the market string beans packed asparagus style, other than your own pack, and later the pack of the San Jose Canning Company?     A. None.

Q. Do you know when Mr. Rancadore first packed string beans asparagus style?     A. 1922.

Q. 1922?     A. Yes.

Q. I hand you Defendant's Exhibit No. 1 in evidence, and ask you, relying upon your experience as a packer, if that model or mold is practicable in the canning of string beans asparagus style?

A. Not practicable.

Q. Why is it not practicable?

A. For several reasons.

Q. Give the reasons.

A. It would not shear off the ends even or square, and then, on bunching them in your hand, when inserting into the can you could not keep the ends perfectly square or even, because in the movement it would be possible that the beans would slip, or some of them would slip, and, therefore, when in the can they would not be perfectly even, and if uneven at one end they would be uneven at the other end.

(Testimony of Victor Greco.)

Q. Could you push them down after they were in the can?     A. Not without injuring the bean.

Q. In canning string beans asparagus style, Mr. Greco, the principal virtue is in the looks of the product and the appearance of the bean coming out whole?     A. Yes.

Q. And it is in the natural state, except it has been tipped at either end?

A. Yes, and because of that condition there is a differential in price, about double; in other words, the beans that are cut, the same beans will sell from \$1 to \$1.15 per dozen, or \$2 to \$2.30 per case, there being two dozen to the case, while the asparagus beans sell all the way from \$4 to \$4.50 a case, all on account of the appearance.

Q. In model No. 2, which you see here on the Master's desk, the ends can be sheared off to better advantage?     A. Yes.

Cross-examination.

Mr. ARMSTRONG.—Q. Mr. Greco, you testified that during all of the years that you have been packing beans asparagus style you have never seen any beans packed asparagus style except yours and those of the San Jose Canning Company?

A. Yes, up to 1922.

Q. Up to 1922?     A. Yes.

Q. What about the conditions since 1922?

A. Mr. Rancadore has packed them, and there was another concern in the San Joaquin *Joaquin*

(Testimony of Victor Greco.)

Valley to whom a license had been sold to pack them, and who are since out of business.

Q. What license—your license?

A. Yes, Greco patent license, and another concern.

Q. What did that licensee pay for that license?

Mr. LINN.—We object to that as immaterial, irrelevant, and incompetent.

The MASTER.—The objection is sustained, as the price is not material.

Mr. ARMSTRONG.—Q. Did you ever hear of the Pride Packing Company?

A. I was going to mention that the Pride Canning Company was also canning.

Q. When did they first start to can?

A. I think in 1925 or 1926.

Q. Are you sure they were not packing in 1922?

A. Positively not, and maybe not in 1925.

Q. You said that the only advantage of packing beans asparagus style was that they had a better look, and, by reason of looking better, they commanded a better price?      A. I did.

Q. That is your idea?      A. Yes.

Q. Quality had nothing to do with the price?

A. Well, that makes the quality.

Q. The looks do not make quality. You might have put celluloid beans in there and they looked fine, but that would not make quality.

Mr. LINN.—I object to the question as argumentative.

Mr. ARMSTRONG.—It is argumentative.



(Testimony of Victor Greco.)

Q. You say that all that makes the difference in price as between the asparagus style beans and beans that have been packed in the customary cut style is the looks of the bean, the quality does not make any difference, at all?

A. Naturally it has got to be a bean, and not celluloid, as you say. We are talking about beans.

The MASTER.—You mean that the appearance is what gives it the differential in price?

A. That is what I mean, yes.

Mr. ARMSTRONG.—Q. You also testified that by reason of this appearance, and having them packed asparagus style enabled you to sell beans for a selling price of about \$4 a case? A. I did.

Q. About how long have you been getting \$4 a case for them?

A. We were getting \$4 a case, \$4.50 a case, in 1922.

Q. That is, a case of two dozen?

A. A case of two dozen, \$4.50 in 1923, 1924, and in 1925, while the San Jose Canning Company, which is the Rancadore cannery, is getting \$4 a case for the same beans, that is, beans packed the same style, that is, cutting our price by 50 cents a case.

Q. Now, on the question of price, since you mentioned it, the cut beans of prime quality bring \$4 a case, don't they? A. They do not.

Q. What are the distinctions in quality in canned beans, irrespective of whether they are asparagus style pack, or cut pack—what are the distinctions

(Testimony of Victor Greco.)

in quality? How do you sell them? For instance, I own an orange grove, and I sell oranges fancy, which is—

A. (Interrupting.) The asparagus bean is called Fancy.

Q. No cut beans called Fancy?

A. Well, yes, and the end pieces, while they are the same bean, because they are not even cut, we just call them Standards, and sell the Standards at a reduced price.

Q. Do you mean to tell the Court that other canneries, not only yourself, but other canneries, do not cut Fancy string beans and pack Fancy string beans in the cut style? A. Yes, they do.

Q. What did they bring, a case, in the market, if you know? A. They will bring under \$4 a case.

Q. Do they bring \$4 a case? A. No.

Q. The Fancy? A. No, I do not think so.

Q. I only want what you know. A. No.

Q. They won't bring \$4? A. No.

Q. Do you pack the Fancy brand of cut beans?

A. No, all our Fancy beans are packed asparagus style.

Q. The only beans you pack in cut style are the ends you cut off the asparagus style beans?

A. Just calling them Standard, but they are the same thing.

Q. It is the same thing? A. Of course.

Q. But there is a Fancy quality of cut bean that brings a price in the market, and you don't know what the price is? A. Yes, there is.

(Testimony of Victor Greco.)

Q. You don't know about the price of anything but the kind you sell, Standards?

A. No, but I am familiar with the price.

Q. What are the prices to-day per case of big or large cut beans?

A. I don't know whether there are any in the market. Beans are scarce at the present time.

Q. There must be a market for them, isn't there?

A. I doubt whether any could be *hand*, but if any could be had the market would be about \$1.25.

Q. What were they last year, per case, not per dozen?      A. About \$3 a case.

Q. Not more than \$3?      A. Not more than \$3.

Q. You stand on that?      A. Yes.

Q. But this year you don't know what the price was?      A. This year we are not packing any.

Q. Don't you suppose other packers will be packing any?

A. They won't be packing until July, 1928.

Q. Ventura County, I suppose they will get some down there?

A. But they are not packing any beans at this time.

Q. In the year 1923, do you know anything about the price of Fancy cut pack beans?

A. In 1923 Fancy cut beans were sold from \$2.50 to \$3 a case. I am going to speak about cases, so that we don't get confused.

Q. I understand that they are two dozen to the case?      A. Two dozen to the case.

(Testimony of Victor Greco.)

Q. Your beans of that year, the asparagus style, sold for \$4.50?     A. \$4.50.

Q. In 1923 they sold for \$4.50 a case?     A. Yes.

Q. Who did you sell any to?

A. All the jobbers, everybody.

Q. Just a minute, not everybody, because you did not sell to everybody, you know.

A. I mean everybody that buys beans.

Q. Just mention a few houses that you sold to at \$4.50 a case, a few important houses.

Mr. ARMSTRONG.—I can shorten this if counsel would stipulate to give us an account of who they sold beans to in 1923, 1924 at \$4 a case. Otherwise I am going to go down the list of jobbers.

Mr. LINN.—I don't know whether I mentioned the price of beans, at all. I don't think I did. But I do not see the materiality of it, even if I did mention it.

The MASTER.—You asked the witness the difference between asparagus style beans and the other beans, and the witness testified due to appearance he got \$4.50 a case. That is what counsel is cross-examining on.

Mr. ARMSTRONG.—I want to test the witness' recollection, too.

The MASTER.—It is within your right. It is perfectly relevant.

Mr. LINN.—We will furnish you with a list.

Mr. ARMSTRONG.—In 1922, 1923—



(Testimony of Victor Greco.)

A. (Interrupting.) I did not say 1922. I said 1923, 1924, and 1925.

Q. You said at \$4 a case to \$4.50 a case?

A. From \$4 to \$4.50 a case.

Q. Will you let me have all that you sold at \$4?

A. From \$4 to \$4.50 a case in 1923, 1924, and 1925.

Q. Does the fact whether or not you sell a man ten cases or a thousand cases make any difference in the price? A. It does.

Q. Will you let me have the quantities, too, the names of the jobbers, the quantity, and the price for those years? A. Yes.

TESTIMONY OF ANTHONY GRECO, FOR  
PLAINTIFF.

ANTHONY GRECO, called for the plaintiff,  
sworn.

Mr. LINN.—Q. Your full name?

A. Anthony Greco.

Q. Mr. Greco, you are the person who secured a patent on what we have referred to as the Greco mold? A. Yes, I am.

Q. Have you been in the canning business?

A. I have.

Q. How long? A. Four or five years.

Q. Since what year?

A. Since the year 1913, and up to the year 1920.

Q. Then you got out of business on account of your health? A. Yes.

(Testimony of Anthony Greco.)

Q. While you were in the canning business, you naturally were interested in the marketing of string beans, and the products that were on the market?

A. Most assuredly.

Q. When did you first see string beans canned asparagus style, either by yourself or by the Greco Manufacturing Company?

A. In the year 1916, as near as I remember.

Q. Your mold was used at that time?

A. It was then that I was inspired with the idea of this mold, and that method of packing.

Q. Prior to that time, were string beans so-called asparagus style? A. Never to my knowledge.

Q. Prior to the year 1922, if you know, were beans ever canned asparagus style by any other person or persons than the Greco Canning Company, or yourself?

Mr. ARMSTRONG.—Objected to, unless the witness gives some foundation for his knowledge, incompetent.

Mr. LINN.—Did you know, when you were in the canning business, or, rather, did you keep track of the product that was put on the market by different canneries?

A. I tried, as part of my business, to keep in touch with the situation.

Q. Then, as far as your knowledge goes, tell us whether or not, prior to the year 1922, any person other than the Greco Canning Company, or yourself, canned string beans asparagus style?

Mr. ARMSTRONG.—Objected to as calling for

(Testimony of Anthony Greco.)

the conclusion of the witness, no foundation laid for his ability to testify.

The MASTER.—Overruled.

Mr. ARMSTRONG.—Exception.

A. I am quite sure that there were no string beans canned asparagus style prior to that time. However, if my memory serves me right, I sold a license for \$2,000 to a man by the name of Ritz, but I never checked on the fact whether he had packed any, or not, but he did pay the money.

Mr. ARMSTRONG.—I move that that all go out as not responsive, and entirely irrelevant to any matter before us now.

The MASTER.—The motion is granted.

Mr. LINN.—No further questions.

Cross-examination.

Mr. ARMSTRONG.—Q. How long did you say you had been in the canning business?

A. From 1913 to about 1919 or 1920, I don't remember exactly.

Q. From 1913 to 1920, or 1919?      A. Yes.

Q. What did you do after you left the canning business?

A. I was out as a fruit grower in the country.

Q. You are now a fruit grower?      A. Yes.

Q. You have nothing further to do with the canning business?      A. Not personally, no.

Q. You don't know anything that happened after 1920, so far as the canning business is concerned?

A. I don't know that I don't know anything that

(Testimony of Anthony Greco.)

happened, I am not as closely in touch with it as I was at the time.

Q. You don't know anything about it of your own knowledge; it is only what people tell you?

A. Yes.

Mr. LINN.—You want a list of the sales referred to?

Mr. ARMSTRONG.—Yes, 1923, 1924, and 1925.

Mr. LINN.—I would like to submit the files from the action in the Federal Court, and in this suit that I referred to, just to show the successive steps taken.

The MASTER.—You are entitled to anything that is in the files; simply by referring to it now, you can introduce anything you wish to.

Mr. LINN.—I will leave with the Master the transcript of the record in the present suit, the record on appeal.

Mr. ARMSTRONG.—There is also a supplementary transcript which I understand was filed after I left for New York.

Mr. LINN.—I will furnish that. That is just two depositions.

Mr. ARMSTRONG.—Those depositions are important on the question of comparison, as bearing on the state of the art.

Mr. LINN.—The other dates that I want are the dates of the suit brought by the Greco Canning Company against Anthony Greco, and against the San Jose Canning Company, to show that suit in 1922. That is what I want.



Mr. ARMSTRONG.—We have already got that. I reserve the right, if I see fit, to file the records in those suits that were spoken of.

The MASTER.—You do not have to file them; you can refer to them. If you tell me what you wish me to consider, that is open to you. They are on file.

[Endorsed]: Filed June 8th, 1928.

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(Title of Court and Cause.)

#### SPECIAL MASTER'S OPINION AND ORDER ON STANDARD OF COMPARISON.

On September 1, 1926, the Master made his order for the filing of a sworn statement of account by defendant. On October 14, 1926, the account was filed. On January 12, 1928, plaintiff noticed a motion for the filing of a further account, conformable to the Master's order, to be heard on January 30, 1928. The parties appearing on that day, defendant filed a motion to amend the Master's order, and argument was heard on both motions. On January 31, 1928, the Master announced to the parties his opinion and order, in substance to the effect that before proceeding further the defendant should prove that hand packing of string beans asparagus style was a known alternative, open to defendant at the time of the infringement found by the decree, and a hearing on this issue was ordered and was had on February 27, 1928. At the request of the parties, the matter was submit-

ted at the close of the hearing on briefs to be filed at times stated. No briefs having been filed, the Master on May 2, 1928, notified the parties that defendant's brief should be filed on or before May 7, 1928, a date subsequently extended by the Master to May 9, 1928; plaintiff's reply to be filed on or before May 14th, and defendant's final brief on or before May 21, 1928. The defendant, on May 9th, filed a brief; plaintiff's brief was filed on May 18, 1928; it seems unnecessary to await defendant's reply.

The evidence taken shows that during the season in 1922 for packing string beans, which season begins each year toward the last of July, the defendant paid a royalty to plaintiff of \$500. At that time the application of Rancadore, general manager of defendant, for the mold later declared to be an infringement of the Greco mold of plaintiff was before the patent office. Toward the end of July, Mr. Rancadore asked one of his employees to get up a device which would facilitate hand packing of string beans asparagus style. The result was the model Exhibit 1. This is a block of wood around which at each end was bent and secured a piece of half-round iron, forming upwardly projecting arms within which a bunch of string beans could be placed on the block, after which the ends were trimmed off with a knife. The upwardly extending iron prongs fulfilled the function of gauging the quantity of beans to be packed in the can and of retaining them while the cutting was going on. The bunched string beans, after having

been trimmed, were then taken out of the device by hand and placed in the can. Defendant's manager, Mr. Rancadore, having tried this operation with some half dozen cans, did nothing further with it. In the seasons of 1923 and 1924 payment of royalty was refused, and defendant packed by the Rancadore mold, declared later to be an infringement.

During the seasons of 1925 and 1926 defendant packed by hand, using to facilitate hand packing the device in evidence as Exhibit 2. This is the same as Exhibit 1 except for the fact that the block projects at each end beyond the iron uprights, affording thus a surface to facilitate a clean cut with the knife.

The account which defendant has filed is based upon a comparison between the cost in filling the can with string beans by the use of the infringing mold and the cost of trimming the beans and filling the can by hand packing aided by Exhibit 2.

The facts stated are abundantly proved, with every evidence of plausibility and with no opposing evidence. It is not claimed that Exhibit 2 is an infringing device, and it seems obvious that it is not. The conclusion therefore follows that the hand packing method of defendant as described and as practiced in the seasons of 1925 and 1926 had been substantially developed by him as early as July, 1922; that he could have used hand packing aided by either Exhibit 1 or Exhibit 2 in the years 1923 and 1924 when he used the infringing mold, and that therefore this hand packing as prac-



ticed is a proper standard of comparison to be used in this accounting. The fact that there is a slight difference, as described, between Exhibit 1 and Exhibit 2, is immaterial. Exhibit 1 could have been used, but the modification by extending the block to facilitate cutting was obvious and a development that ensued naturally as soon as the method was put in practice.

Plaintiff's motion for a further statement, based as it is upon the theory that hand packing was not open to defendant, must be denied. No other grounds of objection have been presented that I know of.

It remains to rule on defendant's motion to amend the order for the account. The first item of defendant's motion is to insert in the order at line 23 the words "by means of the infringing mold," so that the requirement will be, "a sworn statement of account in debtor and creditor form of the profits made by you from canning string beans, packed asparagus style, by means of the infringing mold, during the year 1923," etc. This motion is granted.

Subparagraph (1) requires a statement of "the quantity of beans packed by you asparagus style and the amount of money paid therefor." If plaintiff were entitled to all the profits of defendant for beans packed asparagus style, this requirement might well enter into the accounting. Since, however, the method of packing in this way has not been sustained by the Circuit Court of Appeals, and since it is clear that it was open to defendant to



pack beans asparagus style, by hand, the only profits to be accounted for would seem to be dependent upon the cost of the packing by the infringing mold, as compared with the cost of hand packing. This is the theory of the account as filed, and as the Master is at present advised the theory is correct.

The next part of the motion is to cancel paragraph (4), as follows: "Cost of canning such beans, giving the items of such cost and the cost of each item," and to substitute therefor the words "cost of filling the cans by means of the infringing mold." The motion is granted.

It is next moved to cancel paragraphs 5, 6, and 7 of the order, reading as follows:

"(5) Cost of sale or marketing.

(6) Any other costs properly itemized.

(7) The profits derived by you in such business." and to substitute therefor the following: "cost of filling the cans by means of a standard of comparison." The profits to be accounted for seem plainly to be concerned solely with the cost of filling the cans, and since hand-packing was a proper standard of comparison, open at the time of the infringement, the change seems proper. The motion is granted.

There seems no reason why the preliminary stage of the accounting, having to do with preliminary discovery by defendant by the accepted method of filing a sworn statement of account, should not now be deemed complete, and why the main hearing on the accounting should not proceed. I will appoint Tuesday, June 5, 1928, at 10:00 o'clock A. M., at my

office room, 706, No. 68 Post Street, San Francisco, California, as the time and place for further hearing herein. The parties may then present such evidence as they see fit, to aid the Master in determining profits under the decree. If no such evidence is offered, I will report profits on the basis of defendant's account already filed.

The parties will advise me in advance if a reporter is likely to be required.

Dated May 21, 1928.

H. M. WRIGHT,  
Special Master.

[Endorsed]: Filed June 8th, 1928.

Tuesday, June 5, 1928—2 P. M.

(At this time and at the same place, pursuant to order of the Special Master, the hearing in this matter was resumed, there being the same appearances, as follows:)

The MASTER.—It will be ordered that Erwin M. Cooper be appointed to report and transcribe the proceedings.

Mr. LINN.—I presume that your Honor will make your ruling of May 21, 1928, part of the record?

The MASTER.—Yes.

Mr. LINN.—To that ruling plaintiff wishes to enter his exception.

The MASTER.—Exception will be noted.

Mr. LINN.—And at this time plaintiff wishes, in order to make the record clear, if the Master is not already clear on that point, to prove by the wit-

ness Victor Greco that it is impractical to can string beans asparagus style by hand without the use of the device or devices in evidence known as Exhibit No. 1 and Exhibit No. 2 submitted by the defendant San Jose Canning Co.; in other words, we will prove that it is commercially impractical to can string beans by hand without the use of those two devices.

Mr. ARMSTRONG.—How is that material?

Mr. LINN.—In this respect, Mr. Armstrong: It is our earnest contention that the devices used, Exhibits 1 and 2, are not available as a standard of comparison, they not being available as a standard.

Mr. ARMSTRONG.—The Master has decided that, that it is a matter for the Court to take up.

The MASTER.—The decision is to the effect that the use of the devices, either Exhibits No. 1 or No. 2, as an auxiliary to packing string beans asparagus style by hand, was open to the defendant and is not an infringement—was open to him as a standard of comparison. I think it is quite clear on that point, Mr. Linn, that I did not contemplate that the account that has been given and the evidence that has been given as to the standard of comparison involved packing without some such device as Exhibit No. 1 or Exhibit No. 2.

Mr. LINN.—I understand that to be your Honor's ruling, but if our contention is successful, that devices 1 and 2, that is, the molds offered in evidence by the defendant known as Exhibits No. 1 and No. 2 should be held not to be available for use as a standard of comparison, then I want the record

to show that the packing of string beans by hand without the use of those devices is not commercially practical, and therefore we will revert back to the question of profit, perhaps at some future date, just for the purpose of the record.

Mr. ARMSTRONG.—I object to any such proof being offered, as that point has been closed and submitted, unless the Master sees fit to reopen it.

Mr. LINN.—Just for the purpose of making the record on that point, because we are relying now upon the Master's opinion and from that going on as a basis.

Mr. ARMSTRONG.—You can reopen it by testimony, if you have any, that has not been produced before.

Mr. LINN.—No, for this reason, that we proceeded before on the theory that this device was not available, that is, Exhibits Nos. 1 and 2, were not available as a standard of comparison. Now the Master has ruled that they are available as an aid to packing by hand.

Mr. ARMSTRONG.—The only question left is the accounting.

Mr. LINN.—If we should except to the Master's final ruling in this matter, we want the District Court to be in a position from this record to say whether or not packing by hand without the use of these devices is available as a standard of comparison.

The MASTER.—I will let you make that proof. I doubt if it is material because there is no evidence



(Testimony of Victor Greco.)

that it was so packed. If you want that in the record you may have it.

Mr. LINN.—You will not be willing to stipulate to that?

Mr. ARMSTRONG.—No.

The MASTER.—You have made an objection; it has been overruled and exception noted.

Mr. ARMSTRONG.—If the objection is going to be ruled on I want to state it more specifically. I object to it on the ground that it is entirely immaterial and as a consequence incompetent. There is nothing before the Master at this time on which to accept evidence that would be applicable or in any way material or relevant, and the whole line of testimony is incompetent.

The MASTER.—Objection overruled.

Mr. ARMSTRONG.—I except to the ruling.

TESTIMONY OF VICTOR GRECO, FOR  
PLAINTIFF (RECALLED).

VICTOR GRECO, recalled.

Mr. LINN.—Q. How long have you been engaged in the canning of vegetables? A. Since 1913.

Q. You are familiar with the manner in which vegetables are packed and can be packed?

A. I am.

Q. What has been your position in the Greco Canning Company?

A. President and general manager.

Q. As such you have been actively in charge of the supervision of the canning operations of that company? A. I have.

(Testimony of Victor Greco.)

Q. And that company is engaged in the canning of vegetables of all kinds, including string beans?

A. Oh, yes, sir.

Q. From your knowledge of the canning industry and particularly the canning of vegetables and string beans asparagus style, can you state whether or not string beans can be canned in the manner known as the asparagus style by hand without the aid of some device such as Exhibits 1 and 2 in evidence here?

Mr. ARMSTRONG.—Just a moment. I object to that on the ground it is incompetent, no foundation laid; the president, manager or superintendent does not have to know anything about the mechanical process of canning.

The MASTER.—Overruled.

A. No, they cannot be packed by hand; it is impractical.

Mr. LINN.—Why is it impractical?

Mr. ARMSTRONG.—I think that is argumentative.

Mr. LINN.—It is part of the cross-examination.

The MASTER.—Objection sustained.

Mr. LINN.—That is all.

Cross-examination.

Mr. ARMSTRONG.—Q. Mr. Greco, did you ever can beans, go through the process of canning beans, asparagus style yourself?

A. For a number of years I did my own packing.

Q. I mean asparagus style.      A. Yes.

(Testimony of Victor Greco.)

Q. At that time you used your mold, did you not, when you packed yourself.

A. I had to pack them by hand before I had the mold, and had to discontinue that.

Q. That means you personally did not pack by hand? A. I did with my assistants.

Q. Who were your assistants?

A. The girls in the cannery.

Q. How many girls did you have working in the cannery.

A. 60 or 75. I am referring back to 1914, as far back as that.

Q. That is all right, and then coming along those years, did you ever try to pack by hand?

A. No, due to the fact we were not successful and not being able to pack by hand. That is how the molds originated; that is how we struck the idea of establishing that device or creating that device.

Q. Then, you would say it was absolutely impossible to pack beans asparagus style, by hand.

A. Yes, it is absolutely impossible because it is commercially impractical.

Q. Prior to your commencing to pack beans in the so-called asparagus style you knew that other vegetables were packing in that way, did you not; you had seen other vegetables packed that way?

A. There are other vegetables packed that way except asparagus.

Q. And you knew that they had been packed that

(Testimony of Victor Greco.)

way for 40 or 50 years prior to your engaging in packing beans.      A. Yes, but—

Q. Just a moment. And except that the caliber of the asparagus is a little larger and the asparagus itself a little firmer and stiffer, those were for many years packed by hand, were they not?      A. Yes.

Q. And later on, Sperry and others developed molds; is that not a fact?

A. I don't know about that.

Q. You know that Sperry, one of the largest asparagus packers, used the molds introduced in evidence in this case?      A. No, I don't know that.

Q. Were you present during all of the hearing here?      A. No.

Q. Have you looked at any exhibits offered in this case, besides your own mold?      A. Yes.

Q. Did you look at that mold of tin which is something like a cuff that the women wear with the switch down the center?

A. No, I did not look at it because I did not see one.

Q. You did not see that?

A. No, I don't believe there was any offered.

Q. Have you ever tried since 1914 to pack beans asparagus style by hand without any matrix?

A. Since 1914?

Q. Yes.

A. I can't say that I have; I have had no occasion to try it.

Q. Is it the fact that they cannot measure a



(Testimony of Victor Greco.)

sufficient quantity of beans to put in a can that makes it impossible to pack by hand?

A. Not totally.

Q. What makes it impossible to pack by hand?

A. The fact that they are very limber.

Q. And you cannot take two hands and pick up limber products and pack them in a receptacle?

A. Yes, but without cutting them, they will not mate. The trade recognizes what they ought to have, and because they are limber you do not get the asparagus straight.

Q. Why are not the hands just as valuable for pressing together a number of them and dropping them into a receptacle as a machine?

A. Because you cannot get your hand in the can.

Q. Then, your idea is that the only objection, the only fault or defect in packing by hand is that without a machine they cannot be put in a can straight enough to make a commercial product?

A. That is one idea, not the only idea.

Q. What are the other ideas?

A. You do not get them in the can as tight; you do not cut them uniform; you do not get them in the can straight.

Q. But nevertheless they can be canned that way?

A. Not commercially. It is not practical. You might build an automobile by hand but can you sell it? You need a lot of machinery to build an automobile with.

Mr. ARMSTRONG.—That is argumentative. I move that go out.

(Testimony of Victor Greco.)

The MASTER.—Stricken out.

Mr. ARMSTRONG.—Q. In 1914, when you experimented, the idea of packing the beans that style was new, was it not; did you pack them in that style in 1914?

A. In 1914 it occurred to me to pack beans asparagus style. In 1915 we did the same thing. Then in 1916, we devised the idea of a mold.

Q. And did you use the mold in 1916? A. Yes.

Q. And packed beans asparagus style in 1916?

A. Yes, and have ever since.

Q. How many cans did you try out in 1914?

A. I could not remember the number of cans, but tried it over a period of time, tried it from day to day.

Q. You are testifying very positively as to what can and what cannot be done. In 1914 about how many cans did you and your assistants experiment with?

A. That is a rather difficult question to answer because the question is not right.

Mr. ARMSTRONG.—I move that that go out and that he answer the question.

The MASTER.—Strike it out. Say you do not know, if you do not know.

A. I don't know about how many cans. Of course—

Mr. ARMSTRONG.—I do not want—

Mr. LINN.—I ask that the witness be allowed to explain his answer.

(Testimony of Victor Greco.)

Mr. ARMSTRONG.—He can explain it afterwards.

Q. In 1915, how many cans did you experiment with?

A. I don't know exactly how many cans, but we tried over a period of several days. We may have packed several hundred and we may have packed several thousand.

Q. Did you pack several thousand in 1915 asparagus style?

A. Tried to pack them but they were not right.

Q. Have you any record or books for the years 1914 and 1915 that show your cost of packing or attempted packing?

A. We have records, but we have no record of an experiment, if you put something in a can and dump it out.

Q. Do your records show the cost of the beans that were dumped out in these experiments?

A. No, because that would go into general labor.

Q. All go into labor?      A. Yes.

Q. And charged against your general product; you do not keep any special cost account?

A. We do in certain instances. We did not at that time because this was experimental.

Q. In 1914, how many pounds of beans did you dump as the result of these experiments?

A. I cannot remember that far back. We may have packed a ton or two.

Q. How many girls did you have in your employ

(Testimony of Victor Greco.)

at that time packing, not working on string beans asparagus style? A. We may have had 50 or 60.

Q. Just trying on this one thing?

A. Trying to work at that, not working.

Q. And each of these 50 girls did about how many cans?

A. They filled a lot of cans and dumped them out again, trying to get them right, and we could not do it.

Q. It never occurred to you at that time to have a measure to measure the amount?

A. No, it occurred to us later. It occurred to us in 1915, when we made another experiment.

Q. And since 1915, you have made no experiment to pack beans asparagus style, by hand?

A. Since 1915, I have not.

Mr. ARMSTRONG.—That is all.

#### Redirect Examination.

Mr. LINN.—Q. Mr. Greco, the use of a device similar to the ones in evidence, Exhibits 1 and 2, and also the other devices, your patented device and the device that Mr. Rancadore attempted to pack with?

Mr. ARMSTRONG.—Did pack with.

Mr. LINN.—Q. Did pack with and it was later declared to be an infringement; is that device of any aid or assistance in the measuring of the length of the bean?

Mr. ARMSTRONG.—That is objected to unless he qualifies by having used that device; otherwise it calls for a mere conclusion.



(Testimony of Victor Greco.)

Mr. LINN.—As an expert, I am asking for his conclusion.

Mr. ARMSTRONG.—I am entitled to know whether he ever tried it or not. Otherwise it is incompetent and calls for a conclusion.

The MASTER.—Overruled.

A. It is considerable assistance.

Mr. LINN.—Q. And that is one of the elements which is lacking, is it not in the packing of the string beans by hand, that is, the ability to cut them all to an even length?

A. Yes.

Q. Mr. Greco, when you referred to dumping these string beans, a ton of them by that you mean you dumped them out of the cans and then were able to use them by slanting them up in the old method?

A. That was all dependent on the care they were subjected to in handling. What we could salvage we cut and used. What we could not salvage, which was too broken up at that time, we dumped and threw in the garbage can and threw them away.

Recross-examination.

Mr. ARMSTRONG.—Q. You are satisfied then, that without this device, it would be impossible to measure the beans for cutting in order to pack by hand; that is your testimony?

A. Without which device?

Q. Defendant's Exhibits 1 and 2.

(Testimony of Victor Greco.)

A. Unless you used a rule. You could use a rule and measure it and cut it.

Q. You could mark out two lines on a packing table and put the beans between those and cut them, could you not? A. Yes.

Further Redirect Examination.

Mr. LINN.—Q. Mr. Greco, putting beans on a packing table with two lines at a fixed distance apart and cutting the beans, what about that as a practical proposition?

A. Absolutely impractical; it would be commercially impractical.

Mr. LINN.—No further questions.

Mr. ARMSTRONG.—I am through with the witness.

Mr. LINN.—No further testimony on that subject at all.

As far as this account is concerned, the sworn statement of account produced by the defendant, we do not wish to offer any testimony at all except a question or two of Mr. Rancadore in the nature of cross-examination.

Mr. ARMSTRONG.—The witness Rancadore has already been sworn.

TESTIMONY OF I. RANCADORE, FOR DEFENDANT (RECALLED).

I. RANCADORE, recalled.

Mr. LINN.—Q. I am now referring to the sworn statement of account, which purports to have been

(Testimony of I. Rancadore.)

sworn to by you on the 14th day of October, 1926, and which is on file before his Honor, the Special Master, and shows a saving to the defendant incident to the infringement for the years 1923 and 1924 of \$663.19.

Mr. ARMSTRONG.—What page is that on?

Mr. LINN.—The last page, the recapitulation. This is just for the purpose of identification, that is all.

Q. Mr. Rancadore, you are familiar with the books of your concern?    A. Yes, sir.

Q. Are these figures taken from those books?

A. The sales figures are, yes, the amount of string beans packed asparagus style.

Q. Those figures only, are taken from your books?

A. From the invoices.

Q. The computation of the saving is not taken from your books?    A. No, sir.

Q. How did you arrive at that?

A. That is what we were paying.

Q. That is what you were paying?

A. The amount we were paying before and the amount paid afterwards.

Q. Was that taken from your books?

A. We do not keep them in our books; nobody does. The only thing we keep in the books, is the pay-roll that we pay out every week.

Q. Did you pay by piece work?

A. Yes. We have cards for that but after a couple of years, they are destroyed because they

(Testimony of I. Rancadore.)

accumulate too much. We only keep the cards 2 years.

Q. And that is the way you arrived at these figures? A. Yes, sir.

Q. The difference in the price you paid the girls canning with the use of the— A. Mold.

Q. —the infringing mold and the price you paid them using devices 1 and 2. A. Yes, sir.

Mr. LINN.—That is all.

Mr. ARMSTRONG.—That is all. So far as the method of profits is concerned, the account will stand?

Mr. LINN.—So far as I am concerned on the question of accounts, the matter may be taken as stated there, and of course, I am still firm in my original contention that Exhibits 1 and 2 are not available.

The MASTER.—There is no question that this will be in evidence as part of this hearing.

Mr. ARMSTRONG.—If your Honor has any doubt about it, I move that it be made a part of the evidence and offered in evidence as an exhibit on the part of the defendant.

The MASTER.—It is in evidence and the evidence will stand submitted.

Mr. LINN.—Nothing further, unless your Honor would want further briefs.

The MASTER.—The usual procedure when a report is made is that an opportunity is given to the parties to file objections. I do not see that that procedure should be gone through; it will take time.



It can be waived. The reports will be made final and you could make your objections and have them heard before the Court. It will save time before the vacation.

Mr. LINN.—That will be satisfactory.

The MASTER.—All right. It will be submitted.

[Endorsed]: Filed June 8th, 1928.

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(Title of Court and Cause.)

SPECIAL MASTER'S REPORT ON ACCOUNT-  
ING OF PROFITS.

To the Honorable the Judges of the Above-entitled  
Court:

By the interlocutory decree herein filed and entered June 23, 1925, it was adjudged "that said plaintiff is entitled to an accounting of the profits made by said defendant as a result of said infringement of said patent and patent rights for the years beginning with and including the year 1923 down to the present time," and the undersigned was by said decree appointed Special Master to take and report the evidence, together with my findings and conclusions thereon. It is to be noted that although the statute allows a plaintiff damages as well as profits, a requirement which has been interpreted as giving to the plaintiff whichever shall be the greater, the decree as framed makes no mention of damages; and the Master, accordingly, has no authority except to find profits. This point has

been called to the attention of the parties, and is understood and apparently acquiesced in.

The proceedings before me follow.

(1) On June 26, 1925, the Master signed an order for a statement, under Rule 63, presented by plaintiff. There is no proof in my files that said order was served, nor was the original returned. Meanwhile an appeal had been taken from the interlocutory decree, and on January 18, 1926, 10 Fed. (2d), page 100, the Circuit Court of Appeals affirmed the decree below as to infringement of claims covering the device but reversed it as to claims covering the method of packing, stating that this method was nothing more than the obviously necessary manner of operating the mechanism.

(2) On September 1, 1926, the Master signed a second order for filing of an account under Rule 63, presented by plaintiff and substantially similar to the one issued in 1925. This order is separately returned.

(3) On October 14, 1926, defendant filed its sworn statement of account, preceded by an extended argument. This account was at the final hearing formally introduced by defendant in evidence, and is separately returned.

(4) Thereafter plaintiff noticed a motion for January 30, 1928, for a further sworn statement of account under Rule 63, and on that date defendant presented a motion for modification of the order of September 1, 1926. The above two notices of motion are herewith separately returned. Argument was had on said day, Clarence A. Linn, Esq., ap-

pearing for plaintiff and A. Schapp, Esq., appearing for defendant.

(5) Thereafter, on January 31, 1928, the Master signed an opinion and order, which is annexed to this report, briefly to the effect that evidence was needed to determine what standard of comparison was open to defendant, and a hearing was ordered for February 27, 1928, on that question.

(6) On February 27, 1928, I was attended by the parties, Clarence A. Linn, Esq., appearing for plaintiff, R. M. J. Armstrong, Esq., and A. Schapp, Esq., appearing for defendant, and evidence was taken on the question of the available standard of comparison, which evidence, contained in a pamphlet volume marked "Volume 1" in 57 pages and in two physical exhibits, defendant's exhibits 1 and 2, is herewith separately returned.

(7) Following this hearing briefs were filed, by the defendant on May 9, 1928, and by the plaintiff on May 18, 1928. Thereafter, on May 21, 1928, the Master signed and filed his opinion and order on the question of the standard of comparison, which order is annexed to this report and, with the first opinion referred to, is to be considered a part thereof. Briefly, it was decided that hand packing aided by either Exhibit 1 or Exhibit 2 was available to defendant as a standard of comparison in 1923 and 1924; plaintiff's motion for a further statement of account being denied and defendant's motion to amend the order being granted. June 5, 1928, was appointed as the time for further evidence to determine profits.



(8) On June 5, 1928, I was attended by the parties, Clarence A. Linn, Esq., appearing for plaintiff and R. M. J. Armstrong, Esq., and A. Schapp, Esq., appearing for defendant. Evidence was taken, which was stenographically reported, and is herewith separately returned as Volume 2. The matter was thereupon submitted without further argument, and it was stipulated by the parties that the provision of Rule 114 of this court providing for the announcement of the report in draft, with opportunity to the parties to file objections with the Master, should be waived; and that the Master's report when ready should be signed and filed as his final report, subject to exceptions to be filed with the Clerk.

The above statement is a full statement of the proceedings before me in this accounting, and the statement made of the evidence received and returned covers all the evidence upon which this report is based.

Responding to the directions in the interlocutory decree, I conclude and report as follows:

1. Defendant's profits, being its savings by reason of the infringement found by the decree, amount to the sum of \$662.19, for which sum plaintiff should have the final decree of this Court against defendant.

2. In addition to said sum, plaintiff should recover interest thereon at the rate of 7% per annum, beginning January 1, 1925, being approximately the close of the infringing period, to date of the final decree herein, and interest thereafter on the amount



of the total profits and accrued interest, at the same rate, until said judgment and decree is paid.

The above is hereby settled, signed and filed as my final report herein, and the parties notified of said action by mail, this 8th day of June, 1928.

H. M. WRIGHT,  
Special Master.

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(Title of Court and Cause.)

EXCEPTIONS TO SPECIAL MASTER'S REPORT.

Now comes the plaintiff above named, and files his exceptions to the report of the Special Master on file herein, and for his grounds of exceptions specifies:

1. Plaintiff excepts to the ruling of the Special Master holding that the hand packing of string beans asparagus style, aided by either Exhibit 1 or Exhibit 2, was available to defendant as a standard of comparison in 1923 and 1924, for the reason that the evidence taken before the Special Master discloses that the hand packing of string beans asparagus style, aided either by Exhibit 1 or Exhibit 2, was not available to the defendant as a standard of comparison in 1923 and 1924.

2. Plaintiff excepts to that portion of the Special Master's report awarding plaintiff damages based upon the saving of defendant by reason of the infringement, using as a basis for such finding of damages the standard of comparison heretofore referred to.

WHEREFORE, plaintiff prays that the report of the Special Master be not confirmed, and that this matter be re-referred to the Special Master for the purpose of ascertaining the profits realized by defendant by reason of the infringement complained of, and for such other relief as may be meet and just in the premises.

ROBERT DUNCAN,  
CLARENCE A. LINN,  
Attorneys for Plaintiff.

Receipt of a copy of the within exceptions to Special Master's report admitted this 27th day of June, 1928.

A. SCHAPP,  
Attorney for San Jose Canning Company.

[Endorsed]: Filed June 28th, 1928.

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 7th day of November, in the year of our Lord one thousand nine hundred an twenty-eight. Present: The Honorable FRANK H. KERRIGAN, District Judge.

(Title of Cause.)

MINUTES OF COURT—NOVEMBER 7, 1928  
—ORDER OVERRULING EXCEPTIONS  
TO SPECIAL MASTER'S REPORT.

Plaintiff's exceptions to the Master's report on accounting of profits heretofore argued and submitted, being now fully considered it is ordered that said exceptions be and they are hereby overruled, and that said report be and the same is hereby confirmed.

[Endorsed]: Entered Nov. 7, 1928.

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(Title of Court and Cause.)

EXCEPTION TO ORDER OVERRULING  
PLAINTIFF'S EXCEPTIONS AND AFFIRMING  
REPORT OF SPECIAL  
MASTER.

The plaintiff Louis Oneal hereby excepts to the ruling of the Court made herein on the 7th day of November, 1928, wherein his exceptions to the Master's report on accounting of profits were overruled and the said report affirmed.

Dated: November 8th, 1928.

ROBERT DUNCAN,  
CLARENCE A. LINN,  
Attorneys for Plaintiff.

[Endorsed]: Filed November 9, 1928.

In the United States District Court of the Northern  
District of California, Southern Division.

No. 1307—IN EQUITY.

LOUIS ONEAL,

Plaintiff,

vs.

SAN JOSE CANNING COMPANY, a Corpora-  
tion,

Defendant.

### DECREE.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That plaintiff, Louis Oneal, have and recover of the defendant, San Jose Canning Company, a corporation, the sum of \$662.19, together with interest thereon at the rate of seven per cent (7%) per annum, beginning January 1, 1925, and costs of suit taxed at \$130.16.

Dated: Nov. 28, 1928.

FRANK H. KERRIGAN.

[Endorsed]: Filed and entered Nov. 28, 1928.



(Title of Court and Cause.)

STIPULATION AND ORDER RE STATE-  
MENT OF EVIDENCE TO BE USED ON  
APPEAL.

It is hereby stipulated and agreed by and between the parties hereto that the transcript of proceedings herein had before the Special Master H. M. Wright, Esq., together with the Special Master's report, the opinions annexed thereto and the exhibits referred to therein contain a true, full and correct statement of the evidence essential to the decision of the questions presented on the appeal herein.

It is further stipulated and agreed by and between the parties hereto that said transcript of proceedings, together with the Special Master's report, the opinions annexed thereto and the exhibits referred to therein may be settled and allowed as the statement of the evidence herein and to be used as a part of the record on appeal.

Dated: December 6th, 1928.

CLARENCE A. LINN,  
ROBERT DUNCAN,

Attorneys for Plaintiff and Appellant.

R. M. J. ARMSTRONG,  
A. SCHAPP,

Attorneys for Defendants and Appellee.

Pursuant to the foregoing, IT IS SO ORDERED.

Dated: December —, 1928.

FRANK H. KERRIGAN,  
United States District Judge.

[Endorsed]: Filed Dec. 19th, 1928.

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(Title of Court and Cause.)

### NOTICE OF APPEAL.

To the Defendant, San Jose Canning Company, a Corporation, and to the Clerk of the Above-entitled Court:

Please take notice that the plaintiff, Louis Oneal, does hereby appeal from the judgment and decree made and entered herein on the 28th day of November, 1928, to the United States Circuit Court of Appeals for the Ninth Circuit.

CLARENCE A. LINN,  
ROBERT DUNCAN,  
Attorneys for Plaintiff and Appellant.

IT IS ORDERED that the bond on appeal in the above matter be fixed at the sum of \$250.00.

Dated: December —, 1928.

FRANK H. KERRIGAN,  
United States District Judge.

[Endorsed]: Filed Dec. 19, 1928.

(Title of Court and Cause.)

## ASSIGNMENT OF ERRORS

Now comes the plaintiff and appellant in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the judgment and decree made by this Honorable Court on the 28th day of November, 1928.

### I.

That the Court erred in overruling the plaintiff's exceptions to the Special Master's report on Accounting of profits.

### II.

That the Court erred in confirming the Special Master's report on accounting of profits.

### III.

That the Court erred in ruling that the hand packing of string beans asparagus style, aided by either Exhibit 1 or Exhibit 2 (in evidence before the Special Master) was available to defendant as a standard of comparison in 1923 and 1924, for the reason that the evidence taken before the Special Master and transmitted to the Court discloses that the hand packing of string beans asparagus style, aided by either said Exhibit 1 or said Exhibit 2 was not available to the defendant as a standard of comparison in 1923 and 1924.

### IV.

That the Court erred in awarding plaintiff dam-

ages based upon the saving of defendant by reason of the infringement, using as a basis for such finding of damages the standard of comparison heretofore referred to instead of awarding plaintiff such damages based upon the entire profits of defendant derived from the packing of string beans asparagus style by use of the infringing device, there being no hand operation for such packing then known.

WHEREFORE, the plaintiff and appellant prays that said decree be reversed.

CLARENCE A. LINN,  
ROBERT DUNCAN,

Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed December 18, 1928.

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CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 147 pages, numbered from 1 to 147 inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$62.70; that the said amount



was paid by the plaintiff and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 7th day of February, A. D. 1929.

[Seal]                      WALTER B. MALING,  
Clerk United States District Court for the North-  
ern District of California.

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CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to San Jose  
Canning Company, a Corporation, GREET-  
ING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Louis Oneal is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the North-

ern District of California, this 8th day of January,  
A. D. 1929.

FRANK H. KERRIGAN,  
United States District Judge.

Due service and receipt of a copy of the within  
citation on appeal admitted this 10th day of Janu-  
ary, 1929.

R. M. J. ARMSTRONG,  
A. SCHAPP,  
Attorneys for Appellee.

[Endorsed]: Filed Jan. 11, 1929.

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[Endorsed]: No. 5714. United States Circuit  
Court of Appeals for the Ninth Circuit. Louis  
Oneal, Appellant, vs. San Jose Canning Company,  
a Corporation, Appellee. Transcript of Record.  
Upon Appeal from the United States District  
Court for the Northern District of California,  
Southern Division.

Filed February 7, 1929.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Ap-  
peals for the Ninth Circuit.

United States Circuit Court of Appeals, Ninth  
Circuit.

No. 5714.

LOUIS ONEAL,

Appellant,

vs.

SAN JOSE CANNING CO., a Corporation,  
Appellee.

REQUEST AS TO PRINTING OF RECORD.

To the Clerk of the Above-entitled Court:

Please print the transcript of the record in the  
above-entitled cause in the following order:

1. Amended Bill of Complaint.
2. Amended Answer.
3. Interlocutory Decree.
4. Order Modifying Interlocutory Decree.
5. Order (page 22).
6. Sworn Statement of Account (page 99).
7. Notice of Motion for Further Accounting  
(page 96).
8. Notice of Motion to Amend Order.
9. Master's Opinion and Order (page 124).
10. Transcript of Proceedings Before Special  
Master (pages 24 to 80).
11. Special Master's Opinion and Order on Stand-  
ard of Comparison (page 130).
12. Transcript of Proceedings before Special  
Master (pages 81 to 95).

13. Special Master's Report on Accounting of Profits (page 120).
14. Exceptions to Special Master's Report (page 135).
15. Order Overruling Same (page 137).
16. Exceptions to Order Overruling (page 138).
17. Decree (page 139).
18. Stipulation and Order (page 140).
19. Notice of Appeal (page 141).
20. Assignment of Errors (page 142).
21. Certificate of Clerk (page 148).
22. Citation (page 149).

Respectfully,  
CLARENCE A. LINN,  
Solicitor for Appellant.

Receipt of a copy of the within request as to printing of record is admitted this 18th day of February, 1929.

A. SCHAPP,  
Attorney for Appellee.

[Endorsed]: Filed Mar. 8, 1929. Paul P. O'Brien, Clerk.